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JULY —DECEMBER

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JULY — DECEMBER, 1974.

Chief Justice

The Hon'ble Thiru K. Veeraswami, B.A., B.L.

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Additional Judges from 27-2-'74.

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THE TAMIL NADU AGRICULTURISTS' RELIEF ACT IV OF 1938 AS AMENDED BY ACT VIII OF 1973 (INTERPRETATION).

By

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The article by Thiru A. Sivasubramania Pillai, Advocate, reported in (1974) 1 M.L.J. (Journal) page 19, interprets the present Act IV of 1938 in favour of debtors. The Act, as amended by Act VIII of 1973, is capable of interpretation in favour of creditors also regarding interest due upto 1st March, 1972.

The intention of the Legislature is to be gathered from the statute alone. If there is any anomaly in the statute, the interpretation should be in favour of creditors, unless it be inconsistent with the provisions of the Act. Wadsworth and Patanjali Sastri, JJ., have held in *M. Varadaraja Perumal Pillai and another* v. *Palanimuthu Goundan*[1], that "Madras Act IV of 1938 is an expropriatory measure and if there is any doubt as to the meaning of its terms, that doubt should be resolved in favour of the person expropriated and not of the person who claims the right to expropriate." It has been held in *State of M. P.* v. *M/s. Azad Bharat Finance Co.*[2], that "it is well-recognised that if a statute leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of words and even the structure of sentence." In *Budhan Singh (dead) by his legal representatives and another* v. *Babi Bux and another*[3], it has been held: "Justice and reason constitute the great legislative intent in every piece of legislation. Consequently, where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the Legislature, there is little reason to believe that it represents the legislative intent."

Section 12 of the present Act provides for interest on old loans. This section has not been amended in any manner. All debts which have been scaled down under the provisions of this Act shall carry *from the date up to which* they have been scaled down, interest on the principal amount due on that date. Section 8 (1) specified 1st October, 1937, as the date up to which debts were scaled down in respect of loans prior to 1st October, 1932. Section 9 specified 22nd March, 1938 (date of commencement of the Act) as the date up to which debts incurred subsequent to 1st October, 1932 were scaled

1. (1940) 2 M.L.J. 838 : I.L.R. (1941) Mad. 132 : A.I.R. 1941 Mad. 118.

2. (1967) 1 S.C.J. 815 : (1967) M.L.J. (Crl.) 439 : A.I.R. 1967 S.C. 276.

3. (1970) 1 S.C.J. 893 : (1970) 2 S.C.R. 10 : A.I.R. 1970 S.C. 1880.

down. While sections 8 (1) and 9 have been deleted by the amendment Act VIII of 1973, section 12 has been retained without any change.

If interest can be collected on the principal amount due *from the date up to which* debts were scaled down, and when no such date is specified anywhere in the present Act after the amendment, what is the date up to which debts are scaled down? Section 7 provides that all debts outstanding on 1st March, 1972 shall be scaled down as per provisions of Chapter II. This section does not provide that all debts shall be scaled down '*up to*' 1st March, 1972. It is like a preamble to Chapter II. Before the amendment, all debts outstanding on 22nd March, 1938 (date of commencement of the Act) shall be scaled down as provided in Chapter II. In scaling down debts, Wadsworth and Patanjali, JJ., have held in *Raman Chettiar* v. *Perumal Udayar*[4] that the creditor is entitled to interest from 1st October, 1937 under section 8 (1). The date of commencement of the Act (22nd March, 1938) was not held to be the date up to which debts were scaled down. Hence it cannot be stated that the date 1st March, 1972, mentioned in section 7 can be taken to be the date "up to which" debts are scaled down.

Section 8 (2) does not present any difficulty. *Explanation* I to sec:·n 8 provides for compulsory adjustment of all payments towards principal, while applying the scaling down provisions under section 8 (3). As per section 8 (3), the principal minus all payments will always be less than twice the amount of principal less all payments.

The question is whether the principal alone is repayable in respect of debts contracted prior to 1st March, 1972, and whether the creditor is not entitled to any interest upto 1st March, 1972. Section 8 (1) as it stood prior to its amendment provided that the principal alone shall be repayable, after wiping out all interest due up to 1st October, 1937. In the present Act, apart from absence of any provision for wiping out of any interest, up to any specified date, there is no specific provision that the principal alone shall be repayable. It is also significant that the Legislature had omitted the provision in section 8 (1) that the principal alone is repayable.

Section 8 (3) provides that the lesser amount of two comparable figures shall be repayable. It does not stipulate that the lesser amount "*alone*" shall be repayable. The word "repayable" occurred in 3 places in section 8 before amendment. Under section 8 (1) it was provided that the principal amount shall alone be repayable. Under section 8 (3) the word "repayable" refers to the "principal" mentioned in section 8 (1). *Explanation* III to section 8 also refers to the principal amount repayable. Though section 8(1) has been deleted, the word "repayable" in section 8 (3) obviously refers to the principal amount repayable.

Since it is not provided specifically that the principal alone shall be repayable, since there is no provision for wiping out of all interest up to 1st March, 1972, since section 12 provides for interest on all debts scaled down, and since the date "*up to which*" debts are scaled down is not provided anywhere in the Act, the creditor is not derpived of interest on debts outstanding on 1st March, 1972. Veeraswamy, C. J., and Krishnaswamy Reddiar, J., have held in *The Weavers Mills Ltd., Rajapalayam* v. *Balkis Ammal and others*[5] that the general principle is "everything is to be taken as permissible unless there has been a prohibition against it".

4. (1941) 1 M.L.J. 256: A.I.R. 1941 Mad. 397.

5. I.L.R. (1969) 1 Mad. 433 : (1969) 2 M.L.J. 509 ; A.I.R. 1969 Mad. 462, at 469.

What is the scaling down that is contemplated under the present Act? Before amendment, since there was no compulsory adjustment of payments towards principal, the debtor was liable to pay interest on outstanding interest also. This possibility has been removed by the existing Act by the provision for compulsory adjustment. Moreover, since the principal amount is being reduced on each payment to the extent of payment, the interest due on the balance of principal also will become less and less. Hence, the interest is considerably reduced and scaled down in favour of the debtor.

The Act does not aim at removing the inequalities of the classes. It aims at giving relief to the indebted agriculturists. The debtor gets relief as aforesaid. The creditor also is protected, since section 12 provides for interest and there is no provision for wiping out of any interest up to any date. The proper interpretation of the present Act is that the creditor is entitled to interest from the date of loan at 6¼ per cent, per annum up to the date of each payment on the outstanding principal, that the date of each payment is the date up to which scaling down takes place, and where no payment is made, the creditor is entitled to interest from the date of loan, on the principle that what is not prohibited is permitted. This interpretation will give relief to honest debtors who have made payments in discharge of debt, and deny relief to those who have not made any payment. The effect of section 12 has not been considered in the recent decision reported in *Ramanathan Chettiar* v. *Oomanathan Chettiar*[6].

Either a Full Bench decision or an amendment to the Act is required to set at rest the anomaly caused by Act VIII of 1973 in respect of interest due up to 1st March, 1972.

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6. (1974) 1 M.L.J. 221 ; 87 L.W. 103.

A CRITIQUE ON THE SICK TEXTILE UNDERTAKINGS (TAKING OVER OF MANAGEMENT) ACT, 1972: CUSTODIAN *VIS-A-VIS* DIRECTORS.

By

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This Act which replaced the Sick Textile Undertakings (Taking Over of Management) Ordinance, 1972, has been given effect to from 31st October, 1972. 46 "sick textile undertakings" with the names and addresses of their "owners" have been listed in the First Schedule of the Ordinance/Act. On and from the appointed day (31st October, 1972) the management of all these sick textile undertakings became vested in the Central Government (*see* section 4 (1).).

It will be seen from the aforesaid schedule that a distinction is sought to be made between the "sick textile undertaking" and the "textile company" which owned it for example, "Pankaja Mills" is the sick textile undertaking and "Pankaja Mills Limited" is the owner thereof.

The title of the Act itself and most of the provisions of the Act seem to emphasise the taking over of the management of the undertaking by the Central Government and nothing is said about the management or the continuance of the management of the textile company after the take over. The inference is that the two managements are entirely different, or in other words, the management of the company still continues to be vested in the shareholders of the company through the Board of Directors of the company, who in turn, can delegate some of their powers (are there any, indeed after the take-over) to the Managing Director(s) Manager, etc., according to the framework of the Companies Act, 1956.

Official view.

The question has assumed importance because of the reported recent trends of the views in official circles, including those of the Solicitor General, that the obligations of the Board of Directors of the "company" still exist after the Government's take-over of the "undertaking", and the Directors are responsible, say for example, for holding Board Meetings once in three months, calling the annual General Meeting, laying the Balance Sheet and Profit and Loss Account before that meeting for the shareholders' approval, filing the Balance Sheet and Profit and Loss Account in time with the Registrar of Companies, effecting transfers of shares and so on.

An attempt will be made here to show that the divesting of the powers of the Directors or of any one connected with the management of the company is so complete under the Sick Textile Undertaking (Taking over of Management) Act, 1972 (hereinafter called the Act) that hardly any residuary powers are left with the old managerial personnel, at least in relation to their powers of managing the undertaking, that it would be illogical or unreasonable to saddle them with any obligations under the Companies Act, 1956.

There may be a textile company owning more than one textile undertaking. There is only one such company in the First Schedule of the Act, that is the Kaleeswarar Mills Company Limited, which owns the *A* unit at Coimbatore and the *B* Unit at Kalayarkoil (District Ramnad). Both the *A* and *B* units are "sick textile undertaking". But in all other cases, each company is the owner of only one undertaking. In these cases it is hard to understand the artificial distinction between the undertaking and the company, because without the management of the undertaking in its hands the company may have nothing else worthwhile to manage. It follows that when the company has no rights in relation to the management of the undertaking, there can be no obligations

either on it, leading to any defaults of its functions. It will be explained later that the Directors of the company have no resources or machinery to effectively fulfil their so called obligations.

Management changes completely.

The following salient features in the Act will show how the managerial hierarchy becomes completely changed after the take-over:

1. The title of the Chapter II is "Management of Sick Textile Undertakings". There is no provision for the consequential changes in the management of the company

2. Section 4 (5) says: "All persons in whom the *business and affairs* of the sick textile undertaking vests immediately before the appointed day (31st October, 1972) shall, as from that day, *cease to be so vested*". The Directors of the company, therefore, become completely divested of the business and affairs of the undertaking, which virtually means also the business and affairs of the company. Only a shadow may be left but not the substance.

3. Section 4 (6).—*Notwithstanding any other law*, any person in whose possession or custody or control the sick undertaking or any part thereof remained before 31st October, 1972, *shall deliver the possession* to the custodian or as the Central Government may direct.

The Directors /company are thus deprived of the possession of the only property which the company possessed before; they possess nothing after the take-over. So, then, what can they manage, really speaking?

4. Section 5 (1), marginal note, clearly reads; "Appointment of Custodian to *take over the management* of sick textile undertaking". And the section further states that the Custodian so appointed *shall carry on the management, etc.*

5. Section 5 (2) reads that the Central Government may appoint the Custodian General (National Textile Corporation) to *exercise supervision and control* over all the sick and textile undertakings for the purpose of *taking over the management* of such undertaking and the *Custodian shall carry on the management* of such undertaking for and on behalf of the Central Government.

6. Section 5 (3) is very categorical. It reads: "The sick textile undertaking shall be deemed to include *all assets, rights, powers, authorities and privileges of the textile company*, in relation to the said sick textile undertaking, and all property, movable and immovable, including lands, buildings, workshops, stores, instruments, machinery, automobiles and other vehicles and goods under production or in transit, cash balances, reserve fund, investments and all other rights and interests in, or arising out of such property as were, immediately before the appointed day, in the ownership, possession, power or control of the textile company, whether within or outside India, and all books of account, registers and all other documents of whatever nature relating thereto."

It looks as if the Board of Directors have no possession of the furniture or stationery in the buildings to enable them to hold their Board Meetings and record their proceedings. They are at the mercy of the Custodian to part with his possession of the Minutes Book to record the proceedings. And what are the Directors supposed to record in the Minutes Book; except the business transactions and affairs relating to the Mill (undertaking) by means of resolutions passed at the meeting?

7. Sections 5 (4), 5 (5), 5 (6) and 7 (1) also refer to the management becoming vested in the Custodian.

8. Section 11 (1), marginal note, again reads: "*Management* of sick textile undertakings pending *taking over* physical posses-

sion by the Custodian". This section further states that even the *textile company has no powers of management* for the short period between the appointed day and date when possession is taken over by the Custodian.

Management in vacuum.

It may still be argued, as stated before already, that the management of the undertaking (its business and affairs) are different from the management of the company. What is there left of the management only in relation to the company? It can only be a management in a vacuum. The business and affairs of the company before the appointed day were exactly the business and affairs of the undertaking or *vice versa.* The company could have no business or affairs of its own in any real commercial sense. In other words, all the business done by the company and affairs attended to by it before the appointed day were only for and on behalf of the undertaking, or for the sake of the undertaking, or in relation to the undertaking and nothing substantially distinct. If therefore the undertaking became "sick", so too the company. The distinction between the undertaking and the company is a legal fiction. It looks like a fiction intended for the purpose of keeping alive the liabilities, responsibilities or obligations of the previous management for some supposed future functions in the name of the company. That is, for all acts or defaults which the Directors never perform or are guilty of, as the case may be, even though they are physically and otherwise legally incapacitated to do or commit them. Such law is indeed strange. It looks like a case of vicarious liability for the acts or defaults of the Custodian who has been really put in charge of all management, possession, affairs, control and what not!

Functional criterion.

The position and status of a Director does not depend upon the name as such given to him. In In re, *Forest of Dean Coal Mining Co.*[1], it was stated that function was everything, name matters nothing. So long as a person is duly appointed by the company to control the company's business and authorised by the Articles of the company to contract in the company's name and on its behalf, he functions as a Director.

Obviously after the take-over, only the name remains and the Director has ceased to function. He can no longer control the company's business and affairs (because there is no business or affairs apart from such of the "undertaking"). We have seen that he cannot make any contracts for the company for and on behalf of the undertaking. And virtually there can be no useful or purposeful contract which the Directors can make only for and on behalf of the company.

There are practical difficulties in working out the management of the company as distinct from the management of the only undertaking which the company owns. It is not contemplated that the Board of Directors could carry on a parallel or independent correspondence with customers, shareholders and Government authorities. The Act does not exclude any form of management which still continues with the Board of Directors. There are also no reservations of powers at all to the Board of Directors of the company in relation to its management of the company as relating to the business of its only undertaking. The Act categorically states in section 4 (5) that all the business and affairs of the undertaking shall vest in the Custodian. The Directors cannot be saddled only with obligations with no rights whatsoever given to them or at least the facilities given to them to carry

1. (1878) 10 Ch.D. 450.

out effectively those obligations, if they are there at all.

Sanctions.

For example, what is the legal sanction for the business transacted at Board meetings, which, in the nature of things, can only relate to the management or affairs of the only subject or undertaking, whose affairs or business were hitherto being managed by them. And then who can decide on the agenda for the Board meetings, if they cannot handle any subjects relating to the business or affairs of the undertaking ? Who is to call for the Board meeting, if they have no business to transact relating to the undertaking, unless the Custodian suggests any?

Section 4 (8) categorically states that "no resolution passed at a meeting of the shareholders of any textile company on or after the appointed day regarding the business of the textile company, in so far it relates to the sick textile undertaking, shall be given effect to unless approved by the Central Government".

We have to visualise the common case of a textile company not having any other business except that of the textile undertaking. Then it follows that any resolution of the general meeting cannot be effective at all without the sanction of the Central Government. In the Companies Act, 1956 there are certain cases, where a resolution of the general meeting must get the approval of the Central Government before the resolution can be given effect to, but certainly not every resolution. Here in the Act, it is worse. No resolution whatsoever can become effective unless approved by the Central Government. When such is the fate of the resolution of the general meeting of the textile company relating to the textile undertaking, it follows that any resolution of the Board of Directors too is equally ineffective. This disability is obvious because the resolutions which can relate only to the business and affairs of the textile undertaking are managed and controlled not by the Directors of the company but by the Custodian or rather by the Central Government itself through the Custodian.

Section 5 (4) says in this connection that the Central Government may issue such directions, to the Custodian or Custodian General as to his or its general powers and duties as the Central Government deems desirable and the Custodian or the Custodian General may apply to the Central Government at any time for instructions as to the *manner in* which the Custodian or Custodian General shall conduct *the management* of the undertaking of the company or in relation to any matter arising in the course of such management.

Custodian is supreme.

So it is obvious that the Custodian is under no obligation to consult the Board of Directors (and much less to carry out the resolutions of the Board relating to the undertaking) for any act of management in conducting the business and affairs of the textile undertaking. And if the Board of Directors of the textile company should pass any resolution in relation to the textile undertaking in conflict with the wishes of the Custodian, it has no machinery to implement its resolution. The Companies Act, which is still regarded as applicable only to their obligations, gives them no right whatsoever to implement their resolutions. Suppose a Director asks the Custodian to call for a Board meeting on a particular day or for a particular purpose and the Custodian does not oblige; there is no remedy for the Board of Directors. Similarly the Directors cannot fix the agenda for the Board meetings because they cannot know or be aware of the needs of the business or affairs of the

undertaking for which decisions have to be taken at Board meetings by means of resolutions, unless the Custodian tells them what is required. Even so, the resolution passed by the Board cannot be effective at all, unless the Custodian (or Central Government) agrees to implement it. Here we are not concerned with the Board transacting any business of the textile company (if there can be anything important arising at all at frequent intervals, except those relating to the business of the textile undertaking. And if the resolutions, of the Board are not sanctions by themselves, why does the Custodian or Central Government require the meaningless formality of going through periodical Board meetings to serve the custodian's own purposes? And what reason can be valid if such ineffective Board meetings are not held and the Directors are penalised for not holding Board meetings as statutorily required under the Companies Act? Have the Directors really committed any default in not holding Board meetings?

Similarly take the case of the preparation of the Balance Sheet and Profit and Loss Account. These documents should obviously relate to the previous year's business and profits or accounts of the textile undertaking. It is not expected that the Board of Directors should convene an annual general meeting for the purpose of laying before it the Balance Sheet and Profit and Loss Account *of the company* (as distinct from the undertaking, whose affairs they do not know or cannot know). If they are expeced to prepare these documents as relating to the business and affairs of the undertaking, what materials are available to them to prepare such documents? They would have surrendered all the books of account of the company (that is, in relation to the undertaking) to the Custodian when he took over. They have no access to these books when the Custodian has been in possession of them or responsible for posting them up to date. They would not have handled the business or transactions which figure in the Balance Sheet or Profit and Loss Accounts to give any explanation to the Auditor to enable him to certify that the accounts have been properly kept or they are true and fair. It is the Custodian who really handled all the business or affairs and it is he who should, or expected to be in a position to give all relevant information and explanations to the Auditor for the purpose of auditing and giving the Certificate thereafter as required by the Companies Act. It will be unreasonable therefore to say that under the Companies Act, the obligation of the Directors still remains for calling an Annual General meeting or lay the Balance Sheet and Profit and Loss Account before it, or afterwards file these documents with the Registrar of Companies within the required time.

And, if the Board of Directors have nothing to do with the business and affairs of the textile undertaking which has earned the profits (though available to the Company for distribution as dividend) how are the Directors to determine the recommendation by them for a suitable dividend or other appropriations? It is the Custodian, really speaking, who can take appropriate decisions under the circumstances. The Custodian is not obliged to accept the recommendation of the Board for any quantum of dividend nor accept even the declaration by the Annual General Meeting in this regard.

Board not responsible.

If the Board of Directors are not responsible for the custody, and maintenance of the account books they cannot also themselves prepare the Balance Sheet and Profit and Loss Account for consideration by the Annual General Meeting of the Company. If they cannot validly prepare it, the

affixing of the signatures of the Directors to these documents will also be meaningless. The Custodian or somebody on his or its behalf can only authenticate these documents by signing. Likewise there can be no report of the Board of Directors to the shareholders but only the report of the Custodian to the shareholders. If the Directors of the company affix their signatures to that report they would only be signing on dotted lines the report prepared by the Custodian without themselves having participated in the preparation of the accounts or the management of the undertaking. It is not provided in the Act that the Custodian should call for annual general meetings and get the approval of the shareholders for the audited accounts. In fact, as we have seen, the Custodian does not require the approval of the shareholders (or the Directors) for any purpose of management or administration. He takes his orders or directions only from the Central Government.

So, then, it seems to me that the Directors can serve no useful purpose by calling Board meetings and transacting any business, unless the Custodian extends his support to them, which he may or may not at his will and pleasure. And similarly if the Custodian calls for a Board meeting and the Directors attend the same they can only play the tune with the Custodian and cannot differ from him in any manner. So the question may arise, what part the Directors can play at the Board meetings.

In this connection it will be well if we look into the Preamble of the Act. It is stated there that the take-over of the management of the sick mill (undertaking) is done in the public interest, "pending nationalisation of such undertakings, for the expeditious rehabilitation of such undertakings so that such rehabilitation may subserve the interests of the general public by the augmentation of the production and distribution, at fair prices, of cheaper varieties of cloth, and for matters connected therewith or incidental thereto."

What Directors can do?

If, therefore Board meetings are actually held, whether on the initiative of the Custodian or the Directors, at best the Directors can put questions to the Custodian how he has progressed in the rehabilitation of the undertaking, how he has augmented the production, how he has bettered the distribution and at what fair prices he has sold and incidental matters, but they cannot pass any resolutions as they wish. The Custodian in fact does not need any resolution to be passed even as he wishes that the Board should pass to carry on any act of management. Really the questions envisaged may more properly be addressed by the Central Government to the Custodian than by the Directors. If such questions are put by the Directors, the Custodian may take them in his stride with a benign condescension and tolerance and give good, bad or indifferent answers. He cannot be compelled by the Directors to act in any particular manner.

The directions and rules by the Central Government to the Custodian or Custodian General contemplated in section 5 (4) of the Act do not seem to have been published yet. When they come out, it may be that the position of the Custodian vis-a-vis the Directors of the company may be clarified, particularly the continuance of the exact residuary powers of the Board (consistent with the Act) and their obligations which are possible to be carried out as enjoined on them by the Companies Act, 1956 and the machinery to assist them to fulfil those obligations. There cannot be only obligations without rights.

Industries Act compared

It would be well in this connection to compare with the provisions of Chapter III-A, entitled " Direct management or control of industrial undertakings by Central Government in certain cases", of the Industries (Development and Regulation) Act, LXV of 1951. In that Act section 18-A gives power to the Central Government to assume management or control of an industrial undertaking in certain cases. Section 18-AA gives power to the Central Government to take over industrial undertakings without investigation under certain circumstances. The effect of a notified order under section 18-A is described in section 18-B clearly thus, in sub-section (1) (*a*) thereof: " all persons in charge of the management, including persons holding offices as managers or directors of the industrial undertaking immediately before the issue of the notified order, *shall be deemed to have vacated their offices as such*". This is unlike the provision in The Sick Textile Undertakings (Taking over of Management) Act, 1972, as we shall more clearly see presently.

In this last Act, the Directors do not vacate their offices but continue as such at least so far as the company (as distinct from the undertaking) is concerned and must fulfil their obligations under the Companies Act—so it is argued. But in the Industries (D. & R.) Act, 1951, sub-section (1) reads: "Where the management of *an industrial undertaking being a company* as defined in the Indian Companies Act (VII of 1913) is taken over by the Central Government, then notwithstanding anything contained in the said Act or in the memorandum or articles of association of such undertaking,—(*a*) it shall not be lawful for *the shareholders of such undertaking* or any other person to nominate or appoint any person to be a director of the undertaking". Here the shareholders of the company are the shareholders of the undertaking and the directors of the company are the directors of the undertaking. The artificial distinction between the company and the undertaking owned by it as if they are entirely two distinct things which is the backbone of the Sick Textile Undertakings (Taking over of Management) Act, 1972 and carried to the extreme is not to such an extent present here. In the Industries (D. & R.) Act, 1951, if the Directors of the undertaking cease to hold their office, they could also be deemed to have vacated their offices after the takeover and they cannot thereafter be responsible for any obligations under the Companies Act or other enactments so far as the business or affairs of the company are concerned.

Furthermore under section 18-F of the Industries (D. & R.) Act, 1951, power has been given to the Central Government to cancel a notified order under section 18-A, "if at any time it appears to the Central Government on the application of the owner of the industrial undertaking or otherwise that the purpose of the order made under section 18-A has been fulfilled or that for any other reason, it is not necessary that the order should remain in force......and on the cancellation of such order the management or the control, as the case may be of the industrial undertaking shall vest in the owner of the undertaking".

Obligations with rights

There is no provision corresponding to section 18-F of the Industries Act, 1951, in the Sick Textile Undertakings (Taking over of Management) Act 1972. Therefore, when the takeover is under the Act of 1972, there is no possibility of the erstwhile owner of the undertaking, that is, the company or its Directors getting back the management or control of the undertaking into its or their hands. This is also clearly evident in the Preamble of

the Act of 1972, wherein it is stated that the take-over is made pending nationalisation of such undertaking. The Act of 1972, is thus more stringent than the Act of 1951, for under the Act the take-over is more or less permanent. If so, it does not stand to reason that the directors of a company or undertaking which has been taken over under the Act of 1972 should be saddled with any obligations or penalties for any acts of default, when they have no rights at all nor the chances of getting back into power, that is the management.

I would, therefore suggest, that unless, the whole industry is nationalised, the rigour of the Sick Textile Undertakings (Taking over of Management) Act, 1972, should be softened, in line with the Industries (Development and Regulation) Act, 1951, so far as takeovers are concerned. There can also be no obligations continuing under the Companies Act, 1956, for the Directors for the duration of the takeover, unless concerned rights are also conceded to them even while the period of takeover lasts.

SPECIAL OR GENERAL RESOLUTION PASSED BY THE BOARD OF DIRECTORS OF A COMPANY?

By

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The title may be intriguing, but this is what strikes one after reading the latest specimen of loose phraseology adopted by our draftsmen in enacting the recent statutes or the rules framed thereunder. I refer to the Central Sales Tax (Registration and Turnover) (Second Amendment) Rules, 1973, published in the Gazette of India, Extraordinary, Part II, section 3, Sub-section (*i*), dated 13th December, 1973.

It is stated that in rule 12 in clause (*a*) of sub-rule (8), after the proviso, the following further proviso shall be inserted, namely:—

"Provided further that in the case of a company incorporated under the Company Act (I of 1956), the declaration in Form 'C' or in Form 'F' can also be signed by any other officer of the company authorised under the Memorandum or Articles of Association of the Company or under any other *special or general resolution passed by the Board of Directors* of the Company, to authenticate any document on behalf of such Company". (Italics mine)

In the first place, the first error noticeable is about the nomenclature of the current company legislation referred to: it should read as "the Companies Act, 1956" and not "The Company Act, 1956".

What is more important, however, is the reference to a so-called 'special or general' resolution of the Board of Directors of a company. One cannot find such categories of resolutions defined anywhere in the current Companies Act, 1956. What are really defined are "Ordinary and Special Resolutions" (*Vide* section 189 of the Act). But these are passed not by the Board of Directors but by the shareholders at the general meeting of the company.

There was a third kind of resolution, *viz.*, an "Extraordinary Resolution" under the old Indian Companies Act, 1913, but by virtue of section 651 of the current Act, any reference to an extraordinary resolution in the articles of a company, or in any resolution passed in general meeting by a company, or in any other instrument, or in any law in force immediately before the commencement of this Act shall, with effect on and from such commencement (1st April, 1956), be construed as a reference to a special Resolution.

In any case, there was never any "general resolution" under the old Act, nor is there any such in the present Act.

What appears to be obviously meant is that any resolution passed by the Board of Directors concerning the instant matter, either specifically or specially authorising a particular person, who is an officer of the Company, to sign the 'C' or 'F' Forms, or wording the necessary Resolution in general terms that certain officers of the company, denoted by their designations, such as office manager, secretary, chief accountant, etc., may be authorised to sign these Forms. There can be no objection also if the following phraseology had been used, "under any resolution passed by the Board of Directors of the company specifically (or specially) or generally authorising certain persons to sign, etc.", instead of "under any other special or general resolution".

The meaning for the purposes of the Sales tax laws may be clear after some thinking, but when the Companies Act, 1956, is specifically or specially referred to in the context, it may not be advisable, or even legal, to ignore the definitions in that Act itself and adopt any popular meanings for the legal terms.

COMPANY LAW : INSPECTION OF DOCUMENTS-II
RIGHT OF ANY PERSON TO INSPECT, OR ASK FOR COPIES OF, DOCUMENTS.

By

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First of all, we shall deal with a comprehensive provision in the Companies Act, 1956, by which, any person may inspect any documents kept with the Registrar of Companies, being documents filed or registered by him in pursuance of this Act, or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection of a fee of one rupee : *See* sub-section (1) (*a*) of section 610.

Any person may also require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, on payment *in advance* of a fee of five rupees in the case of a certificate of incorporation and of one rupee for every 100 words or fractional part thereof required to be copied in the case of a certified copy of extract — *vide* sub-section (1) (*b*) of section 610.

Both these provisions are subject to other special provisions provided elsewhere in the Act.

(A) *Documents with Registrar.*

Now what are the documents or papers filed or recorded in the Registrar's office? This is a big list of some 80 items which cannot be conveniently enumerated here. The reader will do well to refer to Appendix A in Bahl's "Secretarial Practice in India" (1967, 8th Edn., pp. 683 to 688). But it is to be noted therein that the Form under section 33 (1) (*c*) has now become unnecessary consequent to the abolition of the institution of Managing Agents and Secretaries and Treasurers. Also section 31 (2) is a mistype for section 31 (2-A) and 497 (6) for 497 (4) and 551 (6) for 555 (6). Form prescribed under section 149 (2-A) has also been omitted. The reader may also refer to such list in "Secretarial Practice" by Ananda Lal Basu, (1971 Edn.), pp. 405-422.

Higher fees.

Here we must note the difference between the rights of a member and those of any person. Under section 163, in the Register of members and or Register of Debenture-holders and the annual returns, etc., and several other provisions where inspection is allowed to members, the member or debenture-holder is entitled to make the inspection during business hours and subject to the company's regulations in this behalf, free of charge. They could also make extracts from any such register, index or copy or any of those documents without fee or additional fee. Only when they wanted copies to be supplied to them, they had to pay to the Company a fee of 37 paise for every 100 words or part thereof so copied. But if the member wants a copy of any of those documents mentioned in section 39, *viz.*, copies of (1) Memorandum ; (2) articles, if any ; (3) ...... ; (4) certain agreements and resolutions under section 192 not embodied in the memorandum or articles, he should pay a fee of one rupee for each of them. But section 610 has prescribed that the outsider (*i.e.*, any person) must pay a fee of one rupee for each inspection and if he requires a certified copy of any extract or document he should also pay at the higher rate of one rupee for every 100 words or part thereof instead of 37 paise for any kind of document (except that the fee for a certificate of incorporation of the Company is Rs. 5).

There are of course certain provisions in the Act, under which any person can inspect any document in the registered office of the company and also obtain copies directly, from the company instead of from the Office of the Registrar of Companies. But these documents are not so many as he could get in the latter case. For example, under section 163, if he wants to inspect the Register of members he must pay a fee of one rupee for each inspection, but if he wants copies of such register he need pay only at the rate of 37 paise for every 100 words or part thereof if he gets the copy from the company. We shall see other examples of such provisions in this article later on. In these instances at least, it would be cheaper for the third-party person to get copies from the company instead of from the Registrar.

Advantage.

But then, there is an advantage in getting the copies from the Registrar's office instead of from the company, wherever possible. Because, according to sub-section (3) of the section 610, "a copy or extract from any document kept and registered at any of the offices for the registration of companies under the Act, certified to be a true copy under the hand of the Registrar (whose official position it shall not be necessary to prove), shall in all legal proceedings, be admissible, in evidence as of equal validity with the original document. But in the case of a copy given by a company, it will be treated only as secondary evidence by the Courts and therefore a Company's official will have to be summoned to give testimony that it is a true copy of the original, or what would be even better evidence, the original document itself will have to be summoned from the company. Hence, perhaps the justification for the higher rate of copying charges collected by the Registrar.

(B) *Prospectus's Annexures.*

There is an important Proviso to section 610 (1), which says that the rights conferred by this section on any person (*i.e.* to inspect documents in, and obtain copies from, the Registrar's office) shall be exercisable—

(*i*) in relation to documents delivered to the Registrar with a prospectus in pursuance of sub-clause (*i*) of clause (*b*) of sub-section (1) of section 60, only during the fourteen days beginning with the date of the publication of the prospectus ; and at other times, only with the permission of the Central Government ; and

(*ii*) in relation to documents so delivered in pursuance of clause (*b*) of sub-section (1) of section 605, only during the fourteen days beginning with the date of the prospectus ; and at other times, only with the permission of the Central Government.

(Section 60 relates to the Registration of a Company which is incorporated or to be incorporated in India, and section 605 to the prospectus of a Company, incorporated or to be incorporated outside India).

(C) *Charges : Registrar's register.*

The "Register of charges" in relation to any Company is one of those documents kept by the Registrar which comes under the special provisions dealt with under the Act, for inspection purposes, as contemplated in the phrase "Save as otherwise provided elsewhere in the Act" in the beginning of section 610. In sub-section (3) of section 130, it is stated that the Register of charges kept by the Registrar in pursuance of that section shall be open to inspection to any person on payment of a fee of one rupee for each inspection. Though the company may file the particulars of the charges created by it in the prescribed forms, the Registrar compiles his own Register in another prescribed Form No. 13 of the Companies

(Central Government's) General Rules and Forms 1956, for each Company and it is inspection of this Register that is contemplated here.

(D) *Charges : Company's register.*

Every Company shall have to keep a "Register of Charges" under section 143 of the Act. And under section 136 it has also to cause a copy of every instrument creating any charge requiring registration with the Registrar of Companies to be kept at the registered Office of the Company. These documents are open to inspection, as we have seen already, during business hours, by *members* without any fee. However, only the Register of Charges (no mention is made of the instruments creating the charge) kept under section 143 is open to inspection by *any person* during the business hours of the company but subject to such reasonable restrictions as the Company may in its articles or general meeting impose so that not less than two hours in each day are available for inspection, on payment by him of a fee of one rupee for each inspection at the registered office of the Company.

Under section 144 inspection of the copies of instruments creating the charge is allowed to a creditor also. Only in the case of *any person* he has no such right.

(E) *Books of account.*

Section 214 (1) of the Act reads : "A holding company may, by resolution, authorise representatives named in the resolution to inspect the books of account kept by any of its subsidiaries ; and the books of account of any such subsidiary shall be open to inspection by those representatives at any time during business hours.

This sub-section could have been more properly added as a separate sub-section in section 209 which deals with the books of account. Section 209 (4) (*a*), or the proposed sub-section (4) when the Companies (Amendment) Bill, 1972 comes into force as we have seen, deals particularly with the right of a director to inspect the books of account. It may be that the representative appointed by a resolution by a holding company may be one of its directors or it may be that he is even a member of the subsidiary company. There is nothing to indicate in section 214 that a member of the subsidiary company cannot be appointed as the representative of the holding company to inspect the books of account of the subsidiary Company.

In this context there seems to be something anomalous in combining the above provision in sub-section (1) with the rights of members of a holding company *vis-a-vis* a subsidiary of this company in sub-section (2) of this section, which, for convenience, is extracted below :

"214 (2). The rights conferred by section 235 upon members of a company may be exercised, in respect of any subsidiary, by members of the holding company as if they alone were members of the subsidiary."

This last sub-section shows that it is not for every purpose that a member of the holding company has the same rights as members of the subsidiary Company but only for the purpose of exercising the rights conferred by section 235, that is, for counting the total voting power required to make an application to appoint an inspector for investigating the affairs of the Company. This is an entirely different matter ; apart from the rights spoken of it has nothing to do with a representative of the holding company or the books of account. This sub-section must therefore have found a better place in section 235. As it stands, the juxtaposition with sub-section (1) in section 214 shows that a member of either the holding company or of the subsidiary could be contemplat-

-ed or appointed as the representative of the holding company to inspect the books of account of the subsidiary.

This creates an untenable prospect. Generally speaking, neither in section 209 nor elsewhere in the Act is there any right categorically given to members to ask for inspection of books of account or of all books and papers but only of certain statutory registers and papers specifically allowed. Even in section 209 (4) (*a*), or the proposed new section 209 (4) as stated above, the right to inspect books of account is categorically given only to the director and not to a member. Clearly, therefore, sub-section (1) of section 214 creates a possible controversial appointment, and it may be illegal too, if a member of the subsidiary is appointed as the representative of the holding company to inspect the books of account of the subsidiary.

(F) *Profit and Loss Account.*

Section 220 requires that three copies each of the Balance-sheet and Profit and Loss Account together with the copies of all the documents which are required by the Act to be annexed or attached to such Balance-sheet or Profit and Loss Account have to be filed with the Registrar within 30 days after they were laid before the general meeting of a company. However, in the case of a private company, copies of the Balance-sheet and the Profit and Loss Account shall be filed separately. The proviso states that in three instances no person other than a member of the Company shall be entitled to inspect, or obtain copies of, the Profit and Loss Account of that Company under section 610 : these cases are :—

(*a*) a private company which is not a subsidiary of a public company ; or

(*b*) a private company of which the entire paid-up share capital is held by one or more bodies corporate incorporated outside India ; or

(*c*) a company which has become a public company by virtue of section 43-A, if the Central Government directs that it is not in the public interest that any person other than a member of the company shall be entitled to inspect, or obtain copies of the Profit and Loss Account of the Company.

(G) *Register of Directors.*

Under section 303 (1) every company shall keep at its registered office a register of its Directors, Managing Director, (Managing Agents, Secretaries and Treasurers), Manager and Secretary containing with respect to each of them certain particulars (detailed in the section). Section 304 (1) gives a right also to any person (apart from a member) to inspect this register on payment of one rupee for each inspection during business hours subject to such reasonabale restrictions as the Company may by its articles, or in general meeting impose, etc.

Furthermore, under sub-section (2) of section 303 the company must send to the Registrar these particulars as specified in the aforesaid register in a prescribed form. When these particulars are received by the Registrar he must enter them in a separate register or registers, so however that all the entries in respect of such company shall be together ; *see* section 306 (1). The register or registers at the Registrar's Office shall be open to inspection "by any member of the public at any time during office hours on payment of the prescribed fee". What the fee is for this purpose has not been stated specifically, as is usually contained in similar sections. Section 610 must, therefore, be applied here and the fee must be taken to be one rupee for each inspection, etc., as usual.

An interesting case arose in the Punjab High Court under section 306. Conflicting returns under section 303 (2) were submitted to the Registrar by two rival groups of executive committees of a

company regarding the election of office-bearers. The Registrar decided one of the reports to be a true one and returned the other. It was held that under section 306 the Registrar had no power to pronounce as to the meetings having been validly held or a particular office-bearer having been duly elected. He could not even return the papers which were filed under section 303. His decision and his endorsement in returning one of the returns was beyond his jurisdiction and he ought to receive the returns once again. Till the conflicting claims were decided by a Court he might not make any entries in the register — See *Jullundur District Registered Factory Owners' Association* v. *Registrar of Companies*[1].

(H) *Liquidator's Accounts.*

According to section 462, the liquidator shall at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as liquidator. The Court shall cause the account to be audited and it may, at any time, require the production of and inspect any books or accounts kept by the liquidator. When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the Registrar for filing ; and each copy shall be open to inspection of *any person interested.* Section 610 will apply in regard to the procedure for inspection.

(I) *Where offence suspected.*

Section 627 (1) states that on an application made to a Judge of a High Court in Chambers by the Public Prosecutor of the State or by the Central Government or by a Company Prosecutor under section 624-A it is shown that there is reasonable cause to believe that any person has, while he was an officer of the company, committed an offence in connection with the management of the Company's affairs and that evidence of the commission of the offence is to be found in any books or papers of or under the control of the company, the Court may make an order authorising *any person* named therein to inspect the said books or papers or any of them for the purpose of investigating, and obtaining evidence of the commission of the offence. The order may require any officers of the company to produce the said books or papers or any of them to such person named in the order.

(J) *List of Creditors.*

In the case of a reduction of share capital under sections 103 to 105 of the Act, the Court will have to sanction it. The Company shall, within the time allowed by the Judge file a list containing the names and addresses of the creditors of the company to whom the enquiry extends. Copies of such list shall be kept at the registered office of the Company and at the office of the advocate of the company, and *any person* desirous of inspecting the same may, at any time, during the ordinary hours of business, inspect and take extracts from the same on payment of the sum of one rupee — *See* Rules 50 and 51 of the Companies (Court) Rules, 1959.

Companies Regulations.

We have seen above, that there are at least 80 documents which are to be filed or registered by the Companies with the Registrar. The procedure which the Registrar has to follow in his office for filing, recording or registering such documents, as the case may be, and the procedure prescribed for making inspection by *anybody* who is interested, at his office, is contained in The Companies Regulations, 1956, Part E (*Regulations under section* 609. We shall refer to a few of them which are relevant to our subject).

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1. (1961) 31 Comp. Cases 673.

The Registrar shall examine, or cause to be examined, every document received in his office which is required or authorised by or under the Act to be registered, recorded by or with the Registrar. If any such document is found to be defective or incomplete in any respect the Registrar shall direct the Company to rectify the defect or complete the document and no such document shall be registered, rectified or filed until the defect has been rectified or the document has been completed, as the case may be. Fees for such purpose shall be payable under Schedule X to the Act, and any additional fee imposed by the Registrar under section 611 (2) is also to be paid. Until these fees are so paid, the document shall not be regarded as having been sent to or received by the Registrar for any purpose specified in or under the Act.

The following particulars shall be endorsed on every document by the Registrar : (*i*) the number assigned to the company in the register of Companies maintained by the Registrar in pursuance of section 21 (1) ; (*ii*) the name of the company; (*iii*) the nature of the document ; (*iv*) its serial number; and (*v*) the date on which it is registered, recorded or filed. Every endorsement so made shall be signed by the Registrar and shall bear his official seal.

If the endorsement aforesaid cannot be conveniently entered on the document itself, it shall be made on a separate sheet which shall be attached to the document, a note regarding such attachment being made on the document and signed by the Registrar. The Registrar shall send an acknowledgment for the receipt of any document to the Company in Form II. Every certificate or copy granted under the provisions of the Act shall be signed and dated by the Registrar, and shall bear his official seal.

Regulation 25 relating to inspection is very important for our present purpose. It reads : (1) *Any person* who wishes to inspect a document registered, recorded or filed with the Registrar in pursuance of the Act, shall apply to him for the purpose and the application shall be accompanied by the fee specified in this behalf in section 610 (1) (*a*) ; (2) The applicant shall be allowed to inspect the document only in the presence of the Registrar or of a person authorised by him in this behalf, and only during office hours ; (3) The applicant shall not be permitted to make a *verbatim* copy of the document inspected. He may, however, take any notes in respect of the contents of the document inspected.

COMPANY LAW : INSPECTION OF DOCUMENTS-III. DIRECTORS' RIGHT TO INSPECTION AND TAKING EXTRACTS, OR OBTAIN COPIES OF, DOCUMENTS.

By

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As against some eighteen items described already in the First Part of this series, concerning the documents which shall be open to inspection by the members of a company, there is just one single section in the Companies Act, 1956, *viz.*, section 209 (4) which deals with the rights of a director of company to demand inspection of documents.

This can be explained only on the basis that the director's right has been shortly described as all-embracing, rather than restricting it to a few items as in the case of a member's rights, which as we have seen is mostly confined to statutory registers maintained by the company and only a few other papers or documents. But there is also another vital difference between the rights of a director and those of a member, that is, the procedure generally outlined in section 163 applicable to members is not specifically made to apply to directors. There seems to be yet another vital difference which we shall deal with later on.

Section 209 (4).

The present sub-section (4) (*a*) of section 209 reads thus : "The books of account and other books and papers shall be open to inspection by any director during business hours". The Companies (Amendment) Bill, 1972, makes this sub-section (4) (*a*) simply sub-section (4) and the other clauses (*b*), (*c*) and (*d*) are proposed to be omitted. Instead a new section 209-A is proposed to be introduced to deal exclusively with the rights of inspection by the Registrar and any Government Officer authorised by the Central Government in this behalf. This we shall study in detail in the next part of this series.

As to what are "books of account" and what are account books which cannot be deemed to have been properly kept, we have already examined in the first part of this series. These are defined in sub-sections (1) and (3) respectively of section 209.

Now sub-section (4) (*a*) or the proposed new sub-section (4) refers, in addition to "books of account" to "books and papers". The definition of "books and/or papers" is given in section 2 (8) of the Act as including "accounts, deeds, vouchers, writings and documents", and is therefore a more comprehensive term including all kinds of documents.

It will be seen from the above provision that the director's right to inspection extends practically to every register, book, or paper (including correspondence) concerning the affairs of the company and is not restricted to any particular documents.

Liquidation Proceedings' File.

There is also rule 360 of the Companies (Court) Rules, 1959. This Rule says that save as otherwise provided by these Rules, every person who has been a director or officer of a Company which is wound up, shall be entitled free of charge at all reasonable times to inspect the file of proceedings of the liquidation and to take copies or extracts from any document therein, and on payment of the prescribed charges, to be furnished with such copies or extracts.

In this connection, there is a special provision in the winding-up sections of the Act which defines when proper books of

account shall not be deemed to have been kept—as distinct from sub-section (3) of section 209. That is section 541 (2), which states, "it shall be deemed that proper books of account have not been kept in the case of any company, if there have not been kept—

(*a*) such books or accounts as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing entries made from day to day in sufficient detail of all cash received and all cash paid ; and

(*b*) where the business of the company has involved dealings in goods, statements of the annual stocktakings and (except in the case of goods sold by way of ordinary retail trade) of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods are those buyers and sellers to be identified."

Section 163 *Inapplicable.*

As stated already, in the case of a director the procedure contained in section 163 of the Act is not made applicable to his right stated in section 209 (4) (*a*), or rather his right under section 209 (4) is not made subject to the provisions of section 163, to take extracts or obtain copies of documents, while many sections concerning a member's right to inspection are made subject to section 163 expressly or the same kind of procedure is again repeated there. But it has been held by the Courts that a right to inspection includes also a right to take extracts, but it cannot also mean to copy out entirely any document. Members have to pay separate fees as prescribed for obtaining copies, at 37 paise for every 100 words or part thereof. Since nothing of this nature is stated as regards the right of a director, it can be taken that at the time of his inspection during business hours, he can, besides taking extracts, also copy out any document entirely. There is no prohibition in this behalf expressly or by implication. In the case of a member, however, he can obtain copies of only those documents of which he is entitled for inspection and he must pay the charges for the copying to the company. He cannot copy out any document himself even if he pays the charges ; it is the business of the company to cause the copies to be prepared. By allowing the director to take copies himself (by implication) the company does not lose any fees, because the company has no statutory right to collect the copying fees from the director.

Right to demand copies.

Here the question may arise whether, as in the case of a member, a director too can demand copies to be supplied to him, whether with or without payment. Section 209 (4) (*a*) or the new proposed section 209 (4) is entirely silent on this point. It seems strange that the Legislature has not expressly given a director this right, although a member has got it, but a little thinking will show that the Legislature has advisedly not given him a right to demand copies but has stopped merely with a right of inspection of books of account and other books and papers. What those reasons may be can be understood if we analyse the duties and responsibilities of the director.

Now there is another significant aspect regarding the director's right of inspection. He can do so only during business hours. But in sub-section (4) (*b*) a similar right of inspection, of course during business hours, is given to the Registrar of Companies and also to any officer of the Government authorised by the Central Government in this behalf. The Registrar of Companies means not necessarily the Registrar himself but he can also depute on his behalf, an Additional, a Joint, a

Deputy or an Assistant Registrar, who all have the duty of registering companies under this Act — *see* definition of "Registrar" in section 2 (40).

This entire sub-section (4) was substituted for the old sub-section by the Companies (Amendment) Act, 1965. A proviso has also been added at the end of clause (*b*) of sub-section (4) to the effect "provided that such inspection may be made without giving any previous notice to the Company or any Officer thereof". There are other clauses (*c*) and (*d*) which follow (*a*) and (*b*) in sub-section (4). The question is whether the proviso above referred to applies only to clause (*b*), next to which or under which it is mentioned, that is, the Registrar and the authorised officer of Government, or also to clause (*a*) that is to the director, in which case the director also can make his inspection during business hours without giving previous notice to the Company or any officer thereof (say the Managing Director or Secretary). By the ordinary canons of interpretation, since the proviso appears only under clause (*b*), and not in any position which is common to both clauses (*a*) and (*b*) or all clauses (*a*) to (*d*), *i.e.*, at the end of clause (*d*) its applicability must be restricted only to clause (*b*) and the officers mentioned therein. Furthermore, if it had been intended to give such right to the director also, the proviso would have been worded to read : "Provided that such inspection by the director, registrar or officer authorised by the Central Government, as the case may be, may be made without giving any previous notice, etc." In a company where there may be a managing director it will be certainly embarrassing to him if any director should choose to walk in during business hours and demand inspection without giving any notice.

Internal Pointers.

There is another well expressed distinction in the section between the rights of inspection by the director and by the Registrar. That is clause (*c*) of sub-section (4). By virtue of this clause, the Registrar or the authorised officer by the Central Government, may, during the course of the inspection make *or cause to be made* copies of the books of account and other books and papers. This is in contradistinction to clause 4 (*a*), which must therefore be taken to mean no more than what it says, *viz.*, that the director has no right expressly given to him to make or cause to be made copies of the books of account and other books and papers. This restriction, if implied, goes even farther than what we saw that if the director so desired he could make copies himself during his inspection but he cannot demand copies to be made out for him.

Anyhow, the question of a director desiring to make copies of documents himself or cause copies to be made for him by the company was not contemplated by the draftsman of the Act or the Legislature. In denying such right, the Legislature must be taken to have seen no necessity at all to provide for such right to a director even for the purpose of effectively discharging his duties as a director, or for any other purpose. But the writer came to know of a recent instance when he was consulted by some Company where this question actually arose on account of a dispute between one director and the other directors.

It would have been strange indeed if a director, who is collectively and severally responsible with the other directors for the proper management of the company, including the proper maintenance of the books of account and other books and papers and who must himself have played a considerable part in the shaping of several decisions by the Board, which only were ultimately recorded in the books and papers of the company, should

himself want copies of such records at some time in the future for any purposes. In section 209 itself, *vide* sub-sections (5) and (6), it has been stated that unless the Board of directors have appointed a competent and reliable person and charged him with the duty of seeing that the requirements of the section were complied with, each one of the directors of the company becomes a defaulter in observing the requirements of the section and is therefore punishable accordingly.

Own responsibility.

The responsibility of an individual director is full, especially in a company which has no managing director nor a manager but is managed by directors. If every director is thus responsible for keeping proper books of account and other books and papers so as to give a true and fair view of the affairs of the company at any time, it can be supposed that he must also be well aware of the contents of these several documents, or he must be presumed to have been all along diligent and vigilant enough to have known these material facts from time to time at all stages. He would have attended several Board meetings, at which most things of any importance would have been discussed and settled and he would probably have concurred with the minutes of those proceedings. If he had any disagreement with the majority opinion of the Board he could have got his dissent recorded in the minutes.

It is also usual in most well-managed companies to send to the directors along with the notice of the Board meeting and the agenda, comprehensive "Notes" in respect of each item of the business to be transacted at the meeting, or give such notes when the meeting is taking place. Thus he would have got all the material particulars which were necessary for him to know. If he had not attended any Board meeting, he would at least have known of what transpired at that meeting when, as is again usual, those minutes are read and confirmed at the next meeting. In some companies copies of the minutes are sent to the directors within a few days after the meeting for their information. If the minutes were not correctly recorded he could have got them corrected at the next meeting. Failing all this he could have availed himself of the right of inspection given to him under section 209 (4) (*a*) and he can still do so when the new section 209 (4) comes into effect.

It is therefore hard to imagine a case where a director may want any copies of any documents or books or papers for the purpose of discharging his duties as a director, which otherwise he will not be able to do. If therefore any director should happen to ask for copies, it is very likely that he may be motivated by some personal grievance against the other directors and may be trying to make a kind of roving investigation into the affairs of the company with a view to taking any possible action. But then he would clearly risk self-incrimination if some of the things to which he may raise objections were in fact irregular or illegal but to which he himself was probably a willing party in the past. If indeed he has other kinds of personal grievances, then the Act surely provides adequate remedies by other appropriate proceedings.

Good Reason.

We have stated earlier that the Legislature must have had some good reason for not making provisions in the Act giving a right to a director to demand copies. There is no kind of restriction on the kind of documents which are to be open to inspection by the directors. Practically anything can be inspected by them. Once the right to demand copies is also equally generally or liberally conceded, there can be nothing to prevent any kind

of fanciful demands by individual directors, whether on account of over-zealousness for the effective discharge of one's duty or for the fulfilment of some personal desires or idiosyncracies or even for that matter some animosity. For example one director may ask for a copy of the general ledger for the whole financial year or even years, another for a copy of the sales or purchase ledger for some years, yet another may set an equally laborious task by aimlessly or endlessly asking for one thing or another especially when they have not got to pay for the same. It may well become impossible for the company to comply with all such demands.

If the Legislature has allowed such rights to the Registrar or an authorised officer by the Central Government to demand copies of certain books and registers, it is because of a definite purpose. They are aiming at some investigation to find out whether there is any truth in the reports they have received regarding the mismanagement or misdemeanour of the company's officers or that a fraud has been committed or with a view to enforce compliance with any provisions of the Companies Act in which respect there has been a default. This is in public interest. In the case of a director demanding copies, there can be no such public purpose.

General Remarks.

Now for a few general remarks by way of conclusion. A director stands in a fiduciary position to the company. He cannot utilise the position and knowledge possessed by him in virtue of his office to the detriment of the company's interests and for his personal advantage: See *Fateh Chand Kad* v. *Hindsons (Patiala) Ltd.*[1] There are also many English decisions accordingly. The right of inspection given to a director is a personal right given to him as a corollary to the personal discharge of his functions as a director, and under colour of that purpose he cannot be allowed to misuse his right for personal ends. If his desire is genuine to get only all necessary information that can best be got by exercising his right of inspection to his heart's content.

Provision in Articles.

A director of a company has no authority other than that given to him by the Articles of Association : *See Mc Collin* v. *Gilpin*[2]. Most companies would have a provision in their articles in more or less the same terms as in section 209 (4) (*a*) or the new proposed sub-section (4) which confers only a right of inspection of any kind of document during business hours. It might imply, as we have seen, a right to the director to take extracts or even copies by himself. This being a personal right it cannot be delegated to an agent, even as he cannot send a representative to attend a Board Meeting instead of himself (*see* section 312 of the Act).

In this connection it may be noticed that the Act specifically provides for inspection even by an agent of a creditor or contributory. See sections 454 (6), 461 (2) and 551 (3). In the case of a director, section 209 (4) (*a*) or the new sub-section (4) as proposed does not specifically provide that a director can cause inspection to be made on his behalf by an agent appointed by him.

However, in *Vakharia* v. *Supreme General Film Exchange Co.*[3], it was held that " a director is entitled to take inspection of accounts not only personally but also through an agent, provided there is no reasonable objection to the person chosen as an agent and the agent undertakes not to utilise the information obtained by him for any purpose other than the pur-

1. (1957) 27 Comp. Cas. 340.

2. (1880) 5 Q.B.D. 380.

3. (1948) 50 Bom.L.R. 140 : I.L.R. (1948) Bom. 439 : A.I.R. 1948 Bom. 301.

pose of his principal. The provision in the articles of association that 'no shareholder or other person shall be entitled to inspect the books of account of the company without the permission of the directors of the company' has no relation to the right of a director of a company to take inspection because such a right being a statutory right cannot be subject to any permission of the directors of the company. If such a permission was intended to prevent a director from taking inspection through an agent, it was *ultra vires* the company"

Law has changed.

With due respect, it is difficult to agree that the Bombay High Court has given a correct decision in the above cited case, especially in the light of our current Companies Act. We have seen that as in the case of a creditor or contributory who can appoint agents to inspect documents, this right has not been specifically given to a director under section 209 (4) (*a*) or new sub-section (4) as proposed and so it must be deemed that he has no such power to delegate his right. It should be immaterial what undertakings the agent can give about secrecy, etc. The Act does not also give a right of inspection of books of account to a member and so any provision in the articles of a company in that regard may be *ultra virrs* the power of directors to allow such inspection even with their consent. Furthermore, this case was decided in 1948 when the law of delegation of directors' powers was contained in section 86-B of the Indian Companies Act, 1913 (the counterpart of the present section 312). Under the old provision it was possible for a "substitute director" to act for a director at a Board meting, during the absence of the "original director" for a period of three months or more from the District in whih Board meetings were ordinarily held. Then the law had imposed also other conditions : (1) provision should have been made made in the articles, or (*ii*) there must be an agreement between the director and the company that the former can assign his office in this regard, (*iii*) that this agreement should have been approved by a special resolution of the company, and (*iv*) if these conditions were satisfied, the power to appoint an alternate or substitute director was not deemed to be an assignment of the office. But now section 312 has prohibited assignment of the Office of a director absolutely and mkes it void, and no provision in the articles nor agreement nor special resolution nor consent of the directors to the person of the agent appointed can validate the assignment. If the director has any doubts; in the matter of certain documents he is inspecting, he can of course, consult experts but he cannot appoint that expert or any other agent to inspect as his substitute, in the same manner as he cannot send a representative to attend Board meetings as a substitute for him.

Personal Wrongs.

Of course, individual or personal wrongs done to a director are in a different category, for example exclusion of a director from attending Board meetings. If a proper notice of a meeting is not given he can sustain an action based on the default because it is a right given to him by statute. Similarly there can be a default by the company only if it were to refuse the right of inspection by a director on his demand. If a company refuses to supply copies of whatever document the director may require, or any statement as may be fancied by him, when there is no statutory provision for granting it, this cannot amount to any individual wrong done to him which can rise give to any cause of action against the company or any of its officers. Such non-compliance cannot amount to any default statutorily speaking.

It will, however, be a different matter if the Articles of a Company provide for the giving of copies of documents to directors when they ask for them. Such a provision, if made, cannot be considered inconsistent with the Act, because this is a matter for internal administration and if the company wants to suffer willingly any inconveniences in this regard it can do so. The statute does not categorically say that he shall not be given copies; it only does not provide for the compulsory grant of copies to a director when he asks for them. By so providing in the Articles, section 9 is not attracted, nor is there any detriment to public interests.

Exception.

However, we have seen that Rule 360 of the Companies (Court) Rules, 1959, specifically provides that the director can himself take copies or extracts from the file of proceedings of liquidation and if he requires copies to be made out he must pay the charges prescribed. *Inter alia* this supports our view that there is no such corresponding provision in the Act giving a right to a director to demand copies of other books and papers even on payment. If he is allowed such right in the winding-up, it is because this particular file is not one of the books and papers to which he can have access when the company is normally working. This has to be treated under the circumstances as a special case and for which exception has to be provided and it has been done.

Yet anomalous.

By the Companies (Amendment) Bill, 1972 clauses (*b*), (*c*) and (*d*) of sub-section 4 of section 209 are proposed to be deleted and replaced altogether by a new section 209-A, after section 209, concerning the rights of inspection of the Registrar and Officer of the Government authorised by the Central Government. Sub-section 4 (*a*) will be re-numbered as (4) and retained. Therefore, after the amendment comes into effect, the arguments *supra* in paragraphs 10, 11 and 12 on the construction of sub-section 4 (*a*) in the context of sub-sections 4 (*b*), (*c*) and (*d*) can no longer be of any avail. The new sub-section (4) will stand by itself and will have to be construed on its own merits. Sub-section (4) will therefore read merely as "The books of account and other books and papers shall be open to inspection by any director during business hours". The following will, therefore, still remain moot questions: (*i*) whether the director will have a right to walk into the office of the Company at any time *without previous notice* (as the Proviso to clause (*b*) of the present sub-section (4) will not be there) and (*ii*) whether the director has further rights, over and above the right of inspection, to make copies and particularly cause to be made copies of the books of account and other books and papers (which are only the rights of the Registrar or Inspecting Officer and clause (*c*) of sub-section (4) will no longer be there). We have seen, however, that as sub-section (4) will still not be subject to section 163, the director can take not only extracts from the books etc., but make copies himself if he likes, and we have also seen this cannot be done by him by employing an agent, notwithstanding *Vakharia's case*[4].

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4. (1948) 50 Bom.L.R. 140: I.L.R. (1948) Bom. 439: A.I.R. 1948 Bom. 301.

AN INTESTATE'S DAUGHTER'S MARRIAGE EXPENSES

By

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I am sorry to say that the decision regarding marriage expenses in *Karuppanna Goundar* v. *Chinna Nachammal*[1], (Justices Kailasam and Ramaswami) was wrong, and regret the delay in explaining why. Not only will such problems occur often, but the principle of the thing must not be lost sight of, lest many similar questions are wrongly decided by analogy with this judgment. The learned Justices did not consider the case of *Rangubai Lalji* v. *Laxman*[2], (see my *Critique of Modern Hindu Law*, 1970, 275-6) followed in *Ananda* v. *Haribandhu*[3] and see *Cont. E.D.* v. *Anari Devi*[4], and *Kanhaya Lal* v. *Jumna*[5]. *Rangubai* demolished *Shiramabai* v. *Kalgonda*[6], in which it had been held that 'the interest of a Hindu Mitakshara coparcener available for division under section 6 of the Hindu Succession Act, 1956, will be such share in the property as would be allotted to him if a partition of the property had taken place immediately before his death *amongst the coparceners according to the rules of Hindu Law with the qualification that the rule of Hindu Law providing a share to the mother and maintenance and marriage expenses to the daughters must be treated as abrogated in view of section* 4 *of the Act*'. It was the words reprinted here in italics which represented the incorrect law demolished in *Rangubai's case*[7]. In all this discussion we must bear in mind that Tamil Nadu and Andhra do not permit widows to share at a Hindu Law partition of coparcenary property otherwise than under the Hindu Succession Act.

The facts in *Karuppanna's case*[8] were these: P died in September, 1964 leaving five daughters, a widow and an only son, S. The fifth daughter was not yet married. At a partition the Courts below awarded her Rs. 2,500 towards her marriage expenses. It was argued against her that *Nalla Lalitamba* v. *Yalle Venkatalaxmi*[9], was against this award. That case indeed denied marriage expenses in a suit for maintenance, but (it was a question of daughters' sharing equally, with sons in an intestate estate) the matter had not been argued from every angle. The Madras High Court had no binding authority on the point and the matter was referred to a bench for disposal on the point of law. Thiru T.R. Mani, claimed that the daughter obtained a share in her father's interest, which might turn out to be much less than sufficient for her marriage expenses; moreover the textual Hindu Law still enabled her to have access to the joint-family funds for this purpose. The Justices concentrated on the Hindu Adoptions and Maintenance Act, 1956, and held with emphasis and conviction that the daughter was not entitled to marriage expenses, since she had her intestate share, which was one-fourteenth of the estate. This is a small fraction, and illustrates the practical position very well. The learned Justices were entirely misled as to the proper approach to the question, and this can be explained very shortly. They agreed (page 35) it was a pity that daughters might be treated

1. (1974) 1 M.L.J. 27 : 87 L.W. 27.
2. (1965) 68 Bom.L.R. 74 : A.I.R. 1966 Bom. 169.
3. A.I.R. 1967 Orissa 194.
4. A.I.R. 1972 All. 179.
5. A.I.R. 1973 Del. 160.
6. (1963) 66 Bom.L.R. 351.
7. A.I.R. 1966 Bom. 169.
8. (1974) 1 M.L.J. 27.
9. (1970) 1 An.W.R. 245.

unequally, but thought it could not be helped: they were mistaken.

When a Hindu coparcener dies intestate, his share passes under the Proviso to section 6 of the Hindu Succession Act, and the relevant Explanation shows how his share is to be calculated. It will be that share of the property which would have been allotted to him if partition had taken place immediately before his death. It should have been obvious that at any such partition the marriage expenses of unmarried daughters must be deducted, before one can arrive at the net share (see Derrett, *Introduction to Modern Hindu Law*, 1963, S. 550 (*iii*) and references there cited, also the amusing *Srinivasa Rao* v. *Seshacharlu*[10], *R.V. Manikka* v. *Thangavelu*[11], *Nachiappa* v. *Muthukaruppan*[12], and *Prithviraj* v. *Kutuka*[13]. It is the net share that passes by succession, and would, in this case, have been subject to that wretched fraction, 1/14. The daughter would thus obtain her marriage expenses, *viz.*, the agreed Rs. 2,500, plus the 1/14.

I am confident that this is the correct solution. How could the learned Justices go wrong? Perhaps because they caught up a couple of unfortunate phrases, one from each side. Firstly the daughter's right was presented as a right of maintenance, and the Court scrutinised the Hindu Adoptions and Maintenance Act, as if it were a code (which it is not), and as if it abrogated the joint-Hindu-family Law, which it does not. The bench paid attention to the position of the kept concubine. It is perfectly true that she no longer has a claim against her paramour's share when it passes by succession (*A. Raja Gopala* v. *A. Sitharamamma*[14]; but the concubine of a predeceased coparcener can still demand maintenance when the family's assets are distributed at one of these deemed partitions caused by the death of another coparcener. In fact the right to marriage expenses is a separate right, parallel to that of maintenance. It arises on the girl's birth and is not associated with her father's death (see the massive discussion at *Guramma* v. *Mallappa*[15]). Next they unfortunately caught up the phrase 'textual law'. These two slips, insignificant in themselves misled them. The maintenance statute of 1956 deals exclusively, so far as sections 21 and following are concerned, with the duty of heirs (and legatees) of deceased Hindus to maintain dependants, provided these have no share in the estate. The order of ideas is simple: first you find the net fund, then you find the heirs to it, then you identify possible dependants, and then you scrutinise their claims. The learned Justices began two stages too late. Indeed, they were right in saying that since the daughter had an intestate share (her miserable 1/14) she could not claim maintenance under the Hindu Adoptions and Maintenance Act, section 22 (2) read with section 3 (*b*) (ii). But she was not claiming anything of the kind: she was participating in the partition. Under *Munnalal* v. *Rajkumar*[16], as applied in *Rangubai's case*[17], (above), once female's rights at a partition have been determined they hold the assets, even if not physically separated for an absolute estate: it is their property. Marriage expenses have not been identified as such property yet

10. (1941) 2 M.L.J. 406 : I.L.R. (1942) Mad. 42 : A.I.R. 1942 Mad. 106.

11. (1963) 2 M.L.J. 297 : A.I.R. 1964 Mad. 35.

12. I.L.R. (1946) Mad. 858, 884 : A.I.R. 1946 Mad. 398 : (1946) 1 M.L.J. 310.

13. A.I.R. 1970 Orissa 4.

14. (1966) 2 S.C.J. 179 : (1966) 2 M.L.J. (S.C.) 17 : (1966) 2 An.W.R. (S.C.) 17 : A.I.R. 1965 S.C. 1970 (here at p. 32).

15. (1964) 4 S.C.R. 497 : A.I.R. 1964 S.C. 510.

16. A.I.R. 1962 S.C. 1493.

17. A.I.R. 1966 Bom. 169.

but they will be one day, I am sure. That is the trend of the times. Finally, 'textual law' is not a happy phrase. The right to marriage expenses at a partition is Anglo-Hindu law, and is not dealt with, still less abrogated, by the Act of 1956. The joint-family law has been left very much alone by the would-be 'codification' as everyone knows. So, my sympathies to Thiru T.R. Mani. He was on the right track, and this case must be reconsidered eventually.

IS NOT EX PARTE EVIDENCE "EVIDENCE RECORDED ON THE MERITS OF THE CLAIM" FOR PURPOSES OF REFUND OF COURT-FEE EVEN IF THE EX PARTE DECREE WERE TO BE SET ASIDE AT A LATER STAGE BY DEFENDANTS' APPEARANCE?

By

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In a recent decision of our High Court dated 7th September, 1973 reported in *Easwaramoothy* v. *Ramakrishnan*[1], it has been held by Mr. Justice N.S. Ramasamy, that under section 69 of the Tamil Nadu Court-fees and Suits Valuation Act XIV of 1955 (hereinafter referred to as the said Act) the plaintiff will be entitled to an order for refund of half the Court-fees paid on the plaint, even if the suit was decreed *ex parte* in the first instance, but later the decree was set aside, on an application by the defendant and subsequently the suit was reported as settled out of Court. The learned Judge while observing that "there is no direct authority on the point" has relied on *Solamalai Mudaliar* v. *Vadamalai Muthiriar*[2], *Phani Bhusan Mukherjee* v. *Phani Bhusan Mukherjee*[3] and *Mst. Lakshmi Devi* v. *Roongta & Co.*[4] The learned Judge has held that *ex parte* evidence should be treated as *'non est'* once the *ex parte* decree is set aside and it is 'no evidence at all' and the same is 'wiped out'. According to the learned Judge once the *ex parte* decree is set aside the parties would be in the same position as they were before recording the evidence.

Under section 69 of the Act, the plaintiff is entitled to refund of half the Court-fees paid under the following circumstances: (1) the suit should be dismissed as settled out of Court; (2) and it should be *'before* any evidence has been *recorded, on the merits of the claim'*. The expression 'recording evidence on the merits of the claim' has been used in the Court-fees Act in section 12 also, in another context. The enactment is a fiscal enactment. Section 69 is a new provision introduced in the enactment of 1955. Evidence may be recorded by Court in certain cases as provided for under Order 14, rule 4, Order 25, security for costs, Order 32, suits by or against minors etc., Order 33, suits by paupers. The preliminary evidence that may be recorded in all these cases is not evidence on the merits of the claim. This new provision which seeks to do justice as between the State and the litigant has to be viewed therefore in the light of the provisions of the Code regarding what is recording of evidence on merits of the claim.

Evidence may be either oral or documentary. In some cases there may not be any documentary evidence but only oral evidence. In such cases unless the suit is dismissed as settled out of Court before P.W. 1 or D.W. 1 is put into the witness box no question of refund will arise. In some cases the parties may without leading oral evidence mark the documents by consent or may examine the witnesses and mark the documents. In all the above cases the words 'recording of evidence' may take in: (*a*) recording of oral evidence without marking documents; (*b*) recording of oral evidence and marking the documents; (*c*) marking the documents without examining anybody. Hence, if any of the three acts is done, it will amount to evidence being recorded on merits of the claim. Even if documents alone are marked the Court records

1. (1974) 2 M.L.J. 137.
2. (1912) 23 M.L.J 273: 16 I.C. 96.
3. A.I.R. 1957 Cal. 170, 171.
4. A.I.R. 1962 All. 381.

the same in its records as evidence let in. Hence to get an order for refund of Court-fees the suit should be dismissed as settled out of Court before the above stages are reached. Supposing a suit is compromised the decree to be passed thereon being one of dismissal, will the plaintiff be entitled to a refund of his Court-fee merely on the plea that no evidence is recorded on merits?

Once the suit is decreed *ex parte*, evidence having been let in on the merits of the claim, what is the effect of the evidence if the *ex parte* decree is subsequently set aside? According to the learned Judge's ruling evidence recorded is 'no evidence at all' and it is 'wiped out' and should be treated as '*non est*' once the *ex parte* decree is set aside.

A study of the case-law in this aspect will reveal that the original evidence has to be viewed with reference to the rights of the defendant after the *ex parte* decree is set aside.

Ramaswamy, J., has relied upon *Solamalai Mudaliar* v. *Vadamalai Muthiriar*[5]. In that case a pro-note which was admitted and marked while recording *ex parte* evidence was objected to by the defendant after the *ex parte* decree was set aside as not being properly stamped. The plaintiff relied upon section 36 of the Stamp Act and contended that the document having been admitted in evidence once, could not be objected to. The learned Judge held that once the *ex parte* decree is set aside the trial had to commence *de novo* and the defendant can object to the admissibility of the document. It is to be noted that this case was decided with reference to the rights of the contesting defendant to cross-examine the witness already examined by the plaintiff after the decree was set aside and the suit was restored.

In *Selvarayan* v. *Amalapoorvanandham*[6] also, it was held that when the *ex parte* decree is set aside all proceedings from the stage of the defendant's non-appearance is set aside.

The above two decisions were considered in *Doraiswamy Reddiar* v. *Ella Reddy and others*[7]. The Division Bench held that the defendant is not bound by proceedings which had taken place in his absence, and such proceedings have not become final as against him. The Bench further held that *Solamalai Mudaliar's case*[8], *Selvarayan's Case*[6] do not prevent the plaintiff from choosing to treat the evidence given by him at the *ex parte* trial, as evidence after the *ex parte* decree had been set aside and a fresh trial had commenced. The Bench further held that it will be an idle farce to once again examine the plaintiff to enable the defendant to cross-examine the plaintiff. The plaintiff can very well say that his previous evidence is enough. The main consideration is that no prejudice should be caused to the defendant. A careful reading of the above decisions will clearly reveal that the evidence recorded previously was not considered as 'no evidence or *non est* or having been wiped out'. The decision in *Doraiswamy Reddiar's case*[7], is still good law. This decision does not seem to have been brought to the notice of N. S. Ramaswamy, J.

The decisions in *Venkata Rao* v. *Lokrev Galreddy*[9], *Phani Bhusan* v. *Phani Bhusan*[10] and *Lakshmi Devi* v. *Roongta & Co.*[11]

5. (1912) 23 M.L.J. 273: 16 I.C. 96.

6. 55 M.L.J. 262: 112 I.C. 691: A.I.R. 1928 Mad. 969 (2).
7. A.I.R. 1956 Mad. 633.
8. (1912) 23. M.L.J. 273 : 16 I.C. 96.
9. (1970) 1 An.W.R. 320.
10. A.I.R. 1957 Cal. 170.
11. A.I.R. 1962 All. 381

cited before the Judge lay down that the evidence taken while the defendant was *ex parte* is not binding on him and will not be admissible against him. The above two decisions do not lay down that the previous evidence taken while the defendant was *ex parte* was *non est* etc. All the above decisions were considered in *Venkata Rao* v. *Lokrev Galreddy*[12] by Justice Narasimham and the learned Judge has held that the plaintiff could very well inform the Court that the prior evidence might be taken to be evidence tendered afetr the fresh trial had commenced.

A Full Bench of the Andhra Pradesh High Court in *Aziz Ahmed Khan* v. *I.A. Patel*[13] after considering the case-law (*Venkata Rao* v. *Lokrev Galreddy*[12] not referred to) referred to the above authorities, differed from *Doraiswamy Reddiar* v. *Ella Reddy and others*[14] and held that the previous evidence is *non est* and not binding on the defendant and not a legal evidence so as to attract section 33 of the Evidence Act, even if the fresh trial is also *ex parte.*

In *Sheik Muhamad Maracayar* v. *Muhamad Ibrahim*[15], Mr. Justice Natesan had to consider a case where a suit filed on the basis of a mortgage by deposit of title deeds, was decreed *ex parte* after examining P.W. 1 and Exhibits A-1 to A-17 being marked. Later the *ex parte* decree was set aside and the defendant filed a written statement and after issues were framed the suit was posted in the list. Before the case was taken up for trial a compromise was filed and in the compromise it was stated that since after the terms of the compromise the suit was settled out of Court refund of half the Court fee may be ordered. Since the compromise memo. pleaded for recording of compromise the refund was refused by the Judge. But in the last paragraph of the judgment the learned Judge observed that 'it is unnecessary to consider whether merely recording of evidence on merits at an earlier stage of the suit will by itself debar the plaintiff from claiming refund of half Court fee, if later the suit is got dismissed as settled out of Court'.

In *Ramaswamy Nadar* v. *Subbusamy Iyer*[16], Justice Natesan had to consider a case wherein, when the case came up for hearing, after Exhibits A-1 and A-2 were marked before any oral evidence could be recorded, the suit was reported as settled out of Court. The learned Judge considered the scope of section 69 and section 12 of Act XIV of 1955 and held that the marking of Exhibits A-1 and A-2 related to the merits of the claim and are thus made part of the record.

On a careful consideration of the case-law, the value to be attached to the evidence, taken while the defendant was *ex parte,* which was subsequently set aside, depends more upon the rights of the defendant after the suit is restored and that no prejudice should be caused to him. In cases even after the *ex parte* decree is set aside and the suit restored to file, even if the defendant remains *ex parte,* so far as the Madras High Court is concerned as per *Doraiswamy Reddiar's case*[17] the evidence taken in the first instance is not wiped out or treated as *non est* but can be still treated as evidence on the merits of the claim, to enable the Court to pass a fresh *ex parte* decree. If so the previous evidence is still on record

12. (1970) 1 An.W.R. 320.
13. A.I.R. 1974 Andh. Pra. 1.
14. A.I.R. 1956 Mad. 633.
15. (1965) 2 M.L.J. 513 : I.L.R. (1966) 2 Mad 311 : A.I.R. 1967 Mad. 311.
16. (1967) 1 M.L.J. 4 : 78 L.W. 752 : A.I.R. 1967 Mad. 180.
17. A.I.R. 1956 Mad. 633.

and section 69 will not be attracted to enable the Court to grant refund of Court fees to plaintiff on the ground that there is no evidence on the merits of the claim and viewed in that light and further as already submitted at the beginning the emphasis according to the new provision is more on evidence on merits and evidence not on merits and the right to refund may have to be based only on this distinction.

Considering all these the decision in *Easwaramoorthy's case*[18] may require fuller consideration by a Bench.

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18. (1974) 2 M.L.J. 137

BOOK REVIEW

THE ENGLISH LEGAL AID SYSTEM : ITS HISTORY AND PRINCIPLES by *Seton Pollock*, 1974. (Publishers : Orient Longman, Bombay, Calcutta, New Delhi and Madras.) Price Rs. 25.

There has been quite for some time a ferment of vocal concern in the matter of providing legal aid. The provisions of the Civil Procedure Code, relating to pauper suits and appeals and the system of State briefs in referred trials on the criminal side do not touch even the fringe of the problem. Equality under the law and equal protection of the law will be a myth if justice is not within the reach of the poorest segments in society. In other words, no man should be denied his rights at law for want of means.

In England a system of legal aid based on charity gave place to a system of legal aid based on civil right with the enactment of the Legal Aid and Advice Act, 1949. Shortcomings in the Act which had prevented the scheme from achieving its social potential were removed by the Legal Advice and Assistance Act, 1972. The stages which had led to the passing of the 1949 Act in England, the declaration of intent underlying the Act, the principles built into the Scheme envisaged by the Act, the structure of the scheme in outline, the way in which it operates, the extent to which it still falls short of achieving Parliamentary expectations and the means by which the shortcomings of the Act can be overcome are set out, in the book under notice, vividly and with remarkable clarity.

The principles underlying the Scheme are: (*i*) Courts and legal services must be available to all irrespective of means ; (*ii*) those availing of such facilities must pay towards the costs of the services having regard to their actual resources ; (*iii*) the services provided must be of the same quality as are available to those who pay including the right to choose the legal adviser ; (*iv*) the lawyers providing the services and also those responsible for the administration of the Scheme must remain professionally independent ; (*v*) no restriction must be imposed either on the lawyer or the client other than what may be required to prevent abuse of the facilities provided ; (*vi*) the lawyers should receive fair and reasonable remuneration for the work done and ; (*vii*) the residual cost must be borne by the community.

The author states frankly that legal aid can develop from more than one starting point and in diverse ways and that each system must be related to its own background and with an eye always upon the future. The book is excellently written and makes interesting reading throughout.

LEGISLATION : PRINCIPLES AND PRACTICE by *M. Ruthnaswamy*, First Edition, 1974. (Published by D. K. Publishing House, Delhi-110035). Price Rs. 45 : $ 9.

As the author points out, though a latecomer in the political life of peoples, legislation has now come to fill a large place therein and seems to be making up for the time lost. There is no doubt that legislation in this country is proceeding at a fast and furious rate. In an age when every institution is challenged to justify itself the legislatures form no exception. Their justification will lie not in the quantity but in the quality of their output and in their functioning as institutions of liberty and progress.

The book is divided into two parts. Part I consists of 16 chapters dealing with various aspects concerning legislation viewed historically. The 16th Chapter carries the captivating caption. "Thus far and no farther : Limits of legislation ". Part II is designed to serve as a practical guide to the new entrants to the legislature and has not concerned itself with the details of Parliamentary procedure. A feature of this book is the attempt to estimate the economic consequences of recent legislation.

The author's survey of the principles of legislation in history and the influence exerted by diverse factors like religion, morality, reason, utilitarianism, humanitarianism, economics, science, socialism, communism and the philosophy of welfare state is masterly and packed with a wealth of information.

The author's remark in regard to State enterprises : " The business of Government is Government not business" (p.153); will find large acceptance. The author's observations: " It is a question whether the Presidential address serves any purpose " (p. 203) ; a common civil code regulating marriages, family relationships, property, inheritance, succession, by way

of permissible legislation, leaving those who want to live under their personal laws to do so, will act as a symbol of national unity of India (p. 219); " tokenism " seems to be one of India's contributions to the arsenal of legislative practice (p. 259) etc.; are interesting as well as thought-provoking.

The book is a study in depth by a reputed scholar with rich experience of the functioning of the legislatures both in the pre as well as post-independence periods. The author's style is vivid and interspersed with humour. The book is of asborbing interest throughout and will serve as a valuable addition to the literature on the subject.

PUBLIC INTERNATIONAL LAW OF PEACE by *A. K. Pavithran*, 1974. (Publishers : Orient Longman Ltd., 36-A, Annasalai, Mount Road, Madras-600002). Price Rs. 18.

The book is intended to meet the requirements of law students. It is claimed that the book has not failed to take in " the durable and dynamic dimensions of international law ". The implications of the rather alliterative phrase are somewhat doubtful as international law is only an inchoate code of doctrine over which the formulae of expediency get the better of justice and the institution has no mandatory authority.

The book is divided into two parts. Part I is introductory dealing with matters preliminary to a study of international law principles, and Part II deals with the several topics of international law like Subjects of international law, Recognition of States, State succession, Objects of international law, Jurisdiction of State, Legal responsibility of States, Individuals in international law, Treaties, International institutions etc. The author is a convinced optimist believing in the certain emergence of a world order and pleads for a revaluation of international law with scope broadened and deepened. The author has given a sound exposition of the principles analytically. He has taken note of all the leading decisions. His statement of law is clear and helpful. A study of the book will benefit students both with reference to their immediate objective and to their comprehension of the proper perspectives.

THE LAW OF MARINE INSURANCE IN INDIA, by *A. B. Gandhi*, First Edition, 1st February, 1974. (Published by Milan Law Publishers, 15/2, Navjivan, Bombay-400008). Price (in India) Rs. 27-50; (Foreign) £ 3.

The marine law in its development has been the law of sea-faring people of the world and is substantially the law merchant. Insurance connected with maritime commerce was the first in history. The law of marine insurance is a product of the law of contract and marine law. It belongs wholly to the domain of the municipal law of each State. In India, the law relating to marine insurance is contained in the Marine Insurance Act of 1963, whose provisions have been largely borrowed from the English Marine Insurance Act of 1906. Liability in respect of risk, pertaining to the carriage of goods by sea undertaken by the insurer, is built round the principle of ' proximate cause ', *i.e.*, the predominant and determining cause which occasioned the loss. The author has presented the principles in the light of the leading decisions in England and India, in a simple and intelligible form. Students, lawyers and commercial men will find the book helpful.

COMPANY LAW SIMPLIFIED by *Khorshed D. P. Madon*, Third Edition, 1974. (Publishers : Progressive Corporation Private Ltd., Bombay-400001). Price Rs. 7-50.

Company law in this country is contained in the Companies Act, which is one of the longest enactments on the statute book. To present an accurate and dependable statement of the law in outline in a simple and lucid manner is quite an art. The author has accomplished the task successfully in the book under notice. The book has been written chiefly for the benefit of the students but it will be of great help to company executives as well. The exposition of the law is topic-wise in the light of the leading decisions, English and Indian. The book is bound to prove popular.

CIVIL PROCEDURE CODE, by *A. K. Pavithran* and *S. Venkataraman*, 1974. (Publishers : Orient Longman Ltd., 36-A, Annasalai, Mount Road, Madras-600002). Price Rs. 16.

Rules of procedure are a *sine qua non* for the advancement of substantive rights. But they are usually technical, drab and complicated. The Civil Procedure Code with its 158 sections and 51 Orders packed with rules is no exception. But, to a lawyer, a more than nodding acquaintance with the provisions of the Code is a stern necessity as they form his tools of the trade. A law student stands similarly placed and cannot neglect a study of the Code. To give a picture of the provisions of the Code in a simple, intelligible form, easy to grasp and bereft of technicalities so as to appeal to students will be no mean achievement. The authors have done this successfully in the book under notice. The book gives a bird's eye view of the provisions of the Code adverting to leading decisions. The presentation of the principles is topic-wise, practical and in a manner which will hold the attention of readers. The book is a boon to law students.

The Judgments and How to Write Them by *S. D. Singh*, Third Edition, 1974. (Publishers : Eastern Book Company, 34, Lalbagh, Lucknow, 226001). Price Rs. 20.

Every Judge or Magistrate has his own style of writing judgments. The Procedural Codes give some guidance but not all that may be needed. The Civil Procedure Code definition of 'judgment' as a " statement given by the Judge of the grounds of a decree or order" focusses attention on the end purpose or object of the judgment and does not go further. It is trite advice that a judgment should be clear, coherent, concise and not prolix. Also judgments fall into different classes and patterns depending on the nature of the case, civil, criminal, small cause etc. Writing a good judgment is often the result of experience and not of mastery of copy book maxims. Still a sound knowledge of the principles — theory as well as practice — that should guide the writing of a judgment is a " must " for every entrant into judicial service. The book under notice deals with the different facets and aspects of a judgment from a practical point of view taking note of observations in decided cases relevant for the purpose. In Appendix I there is a Note for candidates for judicial service. Appendix II gives model judgments in civil cases and Appendix III judgments in criminal cases. The author is a Judge of the High Court with much experience and has given a practical bias to the problem. His exposition is highly valuable and instructive. Readers will find the book stimulating and profitable.

The Liability of Railways as Carriers in India, by *A. B. Gandhi*, First Edition, 1st January, 1974. (Published by Milan Publishers, Bombay-400008). Price Rs. 35.

Railways in India have been nationalised. They constitute the biggest transport system in the country. The Railway administration has become the common carrier but stands distinguished in the matter of liability for loss from road transport carriers. The latter are under the purview of the Carriers Act of 1865. The Railways are governed in the matter by Chapter VII of the Railways Act of 1890, and the amendments effected in 1961. A feature of the Act is its adoption, of the two rates system applying to goods sent at the 'Railway risk rate' and goods sent at the 'Owners risk rate'. In the latter case the liability of the railway for loss continues to be what it was before the 1961 amendments.

The book under notice provides an exhaustive commentary on the carriage part of the Railways Act with the relevant Coaching Rules. The text of the Act is also given. Case-law has been noticed adequately. The comments are analytical and easy to follow. The book will be useful to lawyers, students and commercial men.

The Law of Premises Tenancy and Apartment Ownership, by *Anil Ranjan Biswas*, First Edition, 1974. (Publishers : M/s. Chatterjee Publishing Concern, Calcutta-5). Price Paper back Rs. 21.

Ruro-urban movement has taken an irreversible turn in this country due to increasing industrialisation and greater employment opportunities in urban areas. Too many people to be accommodated with too little accommodation available has given rise to problems like exorbitant rent and arbitrary eviction etc. To cope

with these matters large-scale legislation has been undertaken in the different States. The concepts of 'premises tenancy' and 'apartment ownership' stem out of urbanisation and form the two planks on which the law of urbanisation stands — one controls letting and rent and the other provides ownership to purchasers and lessees. The West Bengal Premises Tenancy Act, 1956 covers the former and the West Bengal Apartment Ownership Act of 1972 and the West Bengal Apartment (Regulation of Construction and Transfer) Act, 1972 together control the latter.

The book under notice gives the texts of these Acts with a section-wise commentary. The annotations are highly informative. The juristic principles underlying the provisions are elucidated and the case law is fully covered. The book will be helpful to lawyers, legislators and students of comparative tenancy laws.

AN INTRODUCTION TO SALES-TAX LAW IN INDIA, by *Chavali Suryanarayanamurthy*, First Edition, 1973. (Published by C. V. Chainulu, P.B. 1823, Chikkadapalli, Hyderabad). Price Rs. 10.

Sales-tax is a fruitful source of revenue contributing about 20% of the States' revenues. The law relating to it is contained in the Central Sales Tax Act and the different States enactments. Sales tax is a tax on the sale of goods and not on the goods themselves. But questions like what are 'goods', what is 'sale', when does property in the goods passes etc., for the purposes of the Sales-tax legislation have given rise to considerable case-law. The author who has been taking special interest in this branch of the law has, in this book, provided a handy and dependable guide serving as an introduction to Sales Tax law. The fundamental principles of the law have been presented competently and lucidly. Students as well as lawyers will profit by a study of the book.

MAINTENANCE OF INTERNAL SECURITY ACT, 1971 by *S. T. Mehta*, First Edition, 1974. (Publishers: Vora Prakashan, Ahmedabad). Price Rs. 3-50.

The Maintenance of Internal Security Act has replaced the earlier Preventive Detention Act on the statute book. The Act is designed to enable the Government to deal with urgent situations disturbing public order, internal security of the State or essential supplies or services. Only recently it was suggested that action can be taken under the Act, even against black-marketeers and for bringing out hidden-stocks of food-stuffs and other essential articles. There is always the possibility that the executive may abuse the power given under the Act. In such cases redress has necessarily to be sought from the Courts. The application of the provisions of the Act has come up before the Courts on a number of occasions and some important decisions have been rendered. The author has brought together the provisions of the law and the leading decisions indicating their significance. The booklet under notice is a welcome publication.

GENERAL PRINCIPLES OF INDIAN LAW by *Dr. Rustom S. Davar* and *Dr. Khorshed D. P. Madon*, Seventh Edition. (Publishers: Progressive Corporation, Bombay). Price Rs. 14/.

"Every one is presumed to know the law" is a trite and ancient adage. but it is not always easy to get at it. In a single handy volume the authors have given a picture of the general principles of the law with which a person should be acquainted and their sources. The sketch covers the Constitution of India, the law of Contracts, the law relating to Negotiable instruments, the law relating to partnerships, the law concerning Transfer of Property, the principles of the law of Torts the law covering the Trial of Actions and Execution Procedure.

The book under notice is a very readable and interesting book written in simple and lucid style. It has an appeal not only to students of law or commerce but also to laymen. The book is bound to help them in understanding and appreciating the salient principles of the law.

THE POWERS OF THE PRESIDENT UNDER ARTICLE 74 OF THE CONSTITUTION OF INDIA.

By

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INTRODUCTION

The powers of the President under the Constitution of India are a subject-matter of controversial discussion since the birth of the Constitution. Several eminent Jurists and Judges have expressed their views on the real and substantive powers which the President of India derives from the Constitution.

As a person who had an opportunity of doing research work on this very topic, I want to share my thoughts with others, on this controversial subject.

I desire to place certain salient and vital features in the Constitution which thinking minds can ponder over.

TWO VOICES

In this present article I content myself with a discussion on the scope of the powers of the President (vis a vis) the advice of the Council of Ministers and refrain from going into the other powers of the President. Two voices are heard in the din of controversy over this aspect. One is that the President being the Constitutional head is bound to follow the 'aid and advice' of the Ministry and the other is that the President is not a mere figurehead but has got substantial powers and the Constitution does not oblige him to heed the advice of the Council of Ministers. The pioneers of the second school of thought mainly base their argument in support of their views on the factors that (1) the Constitution does not provide that the President shall be bound by the aid and advice of the Ministers, (2) The President being committed to the Constitution is bound to preserve the provisions of the Constitution than to scuttle it on the advice of the Ministers, (3) The structure of the Constitution being a federal one, the President must have vital powers to resolve any conflict between the State and the Centre for maintaining the federal structure.

The jurists who belong to the first school of thought say that the real power of the executive lies with the cabinet and the will of the people being reflected by the Council of Ministers, the President is bound by the advice of the Ministers and he shall not be given powers to choke the will of Parliament.

THE POSITION OF INDIAN PRESIDENT

To understand and appreciate the above topic, it is necessary to know what is the real position of the Indian President in our Constitution. I do not believe in comparing one head of State with the heads of other States, who derive their powers under different constitutions and circumstances, but it is important to know whether the act of following the advice of the Council of Ministers is in existence in other States and if so with what differences.

We have framed our Constitution on the basis of Parliamentary Democracy. Ours is not Presidential form of Government as in the United States of America. The powers of the Indian President when compared with the American President are undoubtedly meagre. The American President is elected by the people of the State as a whole. He is the head of the executive whereas our President is the head of State alone. The American President is clothed with enormous powers. "The President of the United States" Laski observes, "is both more or less than a king, he is also both more or less than a Prime Minister".

In short the President of the Union of India can have no comparison with the President of United States of America.

The position which is akin to the Indian President is that of the monarch of England. Dr. Rajendra Prasad in the Constituent Assembly expressed:—

"We have adopted more or less the position of the British monarch for the President".

Though our President is elected, the same system of Parliamentary executive as in England was introduced in our Constitution, reducing the President to a Constitutional head, the real powers being exercised by the Ministers. The following words of Dr. B. R. Ambedkar during the debate in the Constituent Assembly of India correctly portrays the President.

"He is the head of State but not of the Executive. He represents the nation but does not rule the nation. His place in the Constitution is that of the ceremonial device on a seal of which the nation's decisions are made known".

It is in this background we will have to probe into the powers of the President, especially, the extent to which he has to follow the advice and decisions of the Council of Ministers.

ARTICLE 74

It is Article 74 of the Constitution which has to be looked into to determine the powers of the President. Article 74 reads as follows:—

"1. There shall be a Council of Ministers with the Prime Minister as the Head to aid and advise the President in the exercise of his functions.

2. The question whether any and if so what advice was tendered by Ministers to the President shall not be inquired into by any Court".

To consider the spirit and intendment of the above Article we will have to necessarily go through the Constituent Assembly debates which give the line of thought and reason for framing this Article. As stated by me earlier a set of eminent jurists interpret this Article strictly in accordance with its language and conclude that there is nothing in it making the President to follow the 'aid and advice' of the Ministry. They draw strength to their views from Article 74 (2) which bars the jurisdiction of the Court to inquire about any such advice. To these jurists the President is not a mere a 'rubber stamp' and can reject the advice of his Ministers, if it involves a line of action which according to him is unconstitutional. They hold the view that as the head of the executive the President should not be made to follow the decisions of the Ministry and should be given the powers to use his 'discretion'. But, with great respect to these jurists, I wish to point out that the Article should not be construed in the strict sense of its language and has to be broadly interpreted, taking into consideration the debates in the Constituent Assembly on this Article and also the position of the President as intended by the Constitution-makers.

Let us now consider the contentions of the learned men belonging to the second school of thought. They contend that the President having taken an oath to preserve the Constitution under Article 60, should not be compelled to 'just' follow the advice of the Ministers even if he feels that he has to act unconstitutionally if he acts on such advice. According to me it is only an imaginary fear. If such a situation arises the President can address Parliament by virtue of his powers under Article 86. He can express his feeling to Parliament for reconsideration of the matter. If he

convinces Parliament of his views, then the cabinet is bound to revise 'their advice'. On the other hand, if the opinion of Parliament is that such 'advice' is vital in the interests of the Nation and there cannot be any unconstitutionality in following such 'advice' the President has to bow down to the will of the people. If an Act of Parliament to which the President gives his assent is unconstitutional, it is for the Supreme Court to strike it down as *ultra vires* of the Constitution. The President as a single individual should not be given powers to give the go-by to the will of Parliament.

They next contend that for maintaining the federal structure of the Constitution and the harmonious relationship of the Union and the States, the President should have powers independent of the 'advice' of the Ministers. According to me this contention need not be given undue importance. The relationship of the Union and the States are well-defined and demarcated under Chapter IX of the Constitution itself. The role of the President in solving any such difference between the States and the Union can only be persuasive. When the cabinet and Parliament act in accordance with the provisions of Chapter IX the President cannot refuse to follow such advice, as he will be violating the provisions of the Constitution. The jurisdiction is given to the Supreme Court under Article 131 of the Constitution to resolve any dispute between the States and the Union. I may state here the views of Sir Alladi Krishnaswami Aiyar on Article 74:

"The one point which the President misses in the Note is that though the executive power is technically vested in the President, just as the same is vested in the Crown in England, under Article 74 of the Constitution a Council of Ministers with the Prime Minister as the head has to aid and advise the President in the exercise of his functions. Article 74 is all pervasive in its character and does not make any distinction between one kind of function and another. It applies to every function and power vested in the President, whether it relates to addressing the House or returning a Bill for re-consideration or assenting or with-holding assent to the Bill. It will be constitutionally improper for the President not to seek to be guided by the advice of his Ministers in exercising any of the functions legally or technically vested in the President. The expression 'aid and advise' in Article 74 cannot be construed so as to enable the President to act independently or against the advice of the Cabinet".

It is further stated that there is nothing in Article 74 to make it obligatory on the President to follow the 'advice of the Council of Ministers'. As I have stated earlier, the Article has to be interpreted only in the background of the Constituent Assembly debates, which reflect the mind of the founding-fathers in framing this Article. We will have to consider the present and the future circumstances under which this Article is likely to be used and interpreted.

The debates in the Constituent Assembly pertaining to this Article make it clear that the members wanted the President to be bound by the 'advice' of the Council of Ministers. In this context I have extracted hereunder certain discussions of the Members in the Assembly:—

Mr. President.—Where is the provision in the Draft Constitution which binds the President to act in accordance with the advice of the Ministers?

Hon'ble Dr. B.R. Ambedkar.—I am sure that there is a provision and the provision is

that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions.

Mr. President.—Since we are having this written Constitution, we must have that clearly put somewhere.

Hon'ble Dr. B. R. Ambedkar.—Though I cannot point it out just now, I am sure there is a provision. I think there is provision that the President will be bound to accept the advice of the Ministers. In fact, he cannot act without the advice of his Ministers.

Some Hon'ble Members.—Article 61 (1).

Mr. President.—It only lays down the duty of Ministers, but it does not lay down the duty of the President to act in accordance with the advice given by the Ministers. It does not lay down that the President is bound to accept the advice. Is there any other provision in the Constitution? We would not be able even to impeach him, because he will not be acting in violation of the Constitution, if there is no provision.

The Hon'ble Dr. B. R. Ambedkar.—May I draw your attention to Article 61 which deals with the exercise of the President's functions. He cannot exercise any of his functions, unless he has got the advice, 'in the exercise of his functions'. It is not merely to 'aid and advise'. 'In the exercise of his functions', those are the most important words.

Mr. President.—I have my doubts if this word could bind the President. It only lays down that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. It does not say that the President will be bound to accept that advice.

The Hon'ble Dr. B. R. Ambedkar.—If he does not accept the advice of the existing Ministry, he shall have to find some other body of Ministers to advise him. He will never be able to act independently of Ministers.

Mr. President.—Is there any real difficulty in providing somewhere that the President will be bound by the advice of the Ministers?

The Hon'ble Dr. B. R. Ambedkar.—We are doing that. If I may say so, there is a provision in the Instrument of Instructions. In 1951 there was a patent conflict of opinion between the President and the Prime Minister on the aspect of Presidential powers in relation to the advice given by the Ministers. Pandit Jawaharlal Nehru then pointed out:—

"These are serious matters of great constitutional importance. They might involve a conflict between the President on the one side and the Government and Parliament on the other. They would inevitably raise the question of the President's authority and powers to challenge the decision of Government and of Parliament. The consequences would obviously be serious.

I do not wish to say much on this subject except that, in our view, the President has no power or authority to go against the will of Parliament in regard to a Bill that has been well considered by it and passed. The whole conception of constitutional government is against any exercise by the President of any such authority".

The Attorney-General also gave his candid opinion explaining that the President under Article 74 is bound to accept the advice of the Ministers.

The British Parliamentary system is followed in our Constitution. It is the legislature which is supreme under the Constitution. In *Ramjawaya Kapur and*

others v. *State of Punjab*[1], the Supreme Court has observed:

"Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. ....

....

The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions, and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them".

It is also significant to note that the framers of the Constitution have deliberately omitted in Article 74 (1) all references to the 'discretion' of the President while in a parallel article, *viz.*, Article 163 (*i*) dealing with the Governor's powers, they have made it clear in the Article itself that Governors are not bound to act on the 'aid and advice' of the Council of Ministers. This clearly shows that the framers of the Constitution did not want to give such powers to the President above whom there is no authority to check, whereas there is such a check by the President over the Governors.

THE CONVENTION

When Article 74 was incorporated all leading members of the Constituent Assembly thought and piously hoped that the President shall generally be bound to act on the 'aid and advice' of his Ministry and a healthy convention to that effect would be developed and followed. Dr. Rajendra Prasad firmly hoped that:—

"Then we come to the Ministers. They are of course responsible to the Legislature and tender advice to the President, who is bound to act according to that advice. Although there are no specific provisions, so far as I know, in the Constitution itself making it binding on the President to accept the advice of his Ministers, it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and the President, not so much on account of the written word in the Constitution, but as a result of this very healthy convention, will become a constitutional President in all matters".

The conventions which are followed in England stem out of the candid evaluation which took place and ran through in that country for centuries to acquire effective adoption. In India we are in the stage of an infant democracy. The conventions are yet to be evolved and followed. The foggy atmosphere of illiteracy, religious obscurantism, absence of uniform code of conduct amongst the political parties and regional fanaticism covering our nation constitute an insurmountable obstacle to the successful evolution and adoption of conventions. Even in England some conventions were given the go by. The progress of our Nation and its welfare come first and foremost in our thought and that should be the paramount aim and intention of everybody. We cannot afford the formalities of convention, contradiction of feelings, and diversity of opinions to be a stumbling block in our progress. We cannot afford to have conventions especi-

1. A.I.R. 1955 S.C. 549.

ally in a developing stage when social-thinking changes as we advance. We will have to take into consideration the circumstances of social development, the need and necessities of our people, and the compelling circumstances in shaping each and every policy and in implementing them. When we act on progressive thinking, these conventions cannot in any way be given importance nor can we afford to cling on to them, to the detriment of our national progress. It is also seen that certain conventions were not followed after the Constitution was ushered. Hence there is a need for clear understanding and clean demarcation of powers at the high level of the State administration, instead of leaving them to unstable conventions.

Let us suppose that a person who is elected to the Presidential Office by the goodwill of the Council of Ministers, after assuming powers falls out with the Council of Ministers, or the President takes a different attitude altogether in substantial matters of constitutional importance. Can he be allowed to act in his own way? If the President derives his power from Article 74 and sails with the second school of thought and says that he is not bound by the advice of his Ministry what is the remedy? He cannot be impeached by Parliament because he has not violated any provision of the Constitution. Even if impeachment proceedings are initiated, he can dissolve Parliament, dismiss the Ministers and proclaim emergency to assume more powers. His acts cannot also be questioned in a Court of law, by virtue of Article 74 (2). The arising of such contingencies and circumstances are not totally inconceivable or improbable or beyond legitimate visualisation. No one can play the Prophet of the Nation or know what the future has got for us? We cannot always expect the President to have perfect harmonious relationship with the Prime Minister. It is also not safe to assume so and proceed further without making provision for contra-circumstances. Under those circumstances Article 74 should not give room for making any person to justify his act. The Council of Ministers is expected to know and respect the feelings of the people. They are committed to Parliament and have with them the sanction of Parliament for their acts. When there is a course of action suggested by them the voice of the entire nation backs it. If the President refuses to act on the advice of the Ministers in matters of national importance, there will be a total break-down of the Constitution. The elected Ministry will be paralysed. Thus the prosperity of the nation will be completely jeopardised, which we cannot, at any cost, risk. Thiru Alladi Krishnaswami Aiyar neatly expressed this fear which I have extracted below:

> "The Parliament may take one line of action and the executive may take another line of action. An infant democracy cannot afford under modern conditions to take the risk of a perpetual cleavage, feud or conflict or threatened conflict between the legislature and executive".

The fear expressed by the eminent jurist is well founded and should not be lost sight of.

CONCLUSIONS

It would be better for the legislatures to think whether to leave the problem unanswered and allow the fluid nonstatic conventions to govern the relationship of the President and the Ministry or whether to bring a constitutional amendment to make it obligatory for the President to follow the 'aid and advice' of the Ministers. I would humbly suggest that

in a developing nation like ours, where we are facing economic, political and social problems we cannot leave open the constitutional provisions giving room for high officers to express contrary views on their powers. The language of the Constitution has to be made clear. The former President Mr. V. V. Giri, also pointed out that the views of the Ministry may prevail since their views will have the sanction of Parliament. We cannot expect that the men in future will adhere to conventions. It is also not safe to have such important powers to be governed by conventions. It is wiser to go in for an amendment than to risk the whole Constitution being nullified by a future Parliament and the President by resorting to something drastic and radical to the detriment of our Nation. This will not in any way take away the rights of the President to express his views. As the head of State he can always vindicate his feelings and address Parliament on the 'advice' tendered to him. His, as the majesty of the State, is actually vested with a pervasive and persuasive role. While he plays his role he cannot act as a rival with the Centre but only abide by 'advice' of Ministers. As the Supreme Court recently pointed out 'Acting on Ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers in Council, if necessary to consider the matter further. It is in the last resort that he must accept their final advice. Parliament may consider these factors and evolve a candid solution to attain a finality in this regard by way of an amendment in accordance with the Supreme Court ruling and avoid any constitutional catastrophe in future.

THE PERSONAL LAW OF SYRIAN CHRISTIANS IN TAMILNAD.

By

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It is disagreeable that Syrian Christians, whose homes and lands were transferred from Kerala to Tamilnad by the reorganisation that took place in 1956, should be governed, as to Succession, by a law differing from that of Syrian Christians, or indeed any other Christians domiciled and having lands in other talukas of Tamilnad. This kind of chaos, fruitful for lawyers, is anachronistic and almost beyond being justified on historical grounds in an age when whatever is old is generally supposed to be wrong.

In my *Religion, Law and the State in India* (London, 1968), page 542 I commented, "The discrepancies between the personal laws relating to Christians in Kerala and elsewhere retain no justification", and I referred to *Kurian Augusty* v. *Devassy Aley*[1], in which the Kerala High Court held that the Travancore Christian Succession Act II of 1092/1916 was saved by section 29 (2) of the Indian Succession Act, 1925, when the latter was extended to Travancore-Cochin by section 6 of Central Act III of 1951, namely, the Part B States (Laws) Act, 1951. The inconveniences of succession to a single individual taking place under different laws, according as his lands lie in different territories, is pointed out in a learned article by Thiru R. S. Venkatachari ((1974) K.L.T. Journal 42-8), and is very well demonstrated by the judgment of E.K. Moidu, J., in *Mary* alias *Kunjamma* v. *Eliyamma*[2], wherein the learned Judge took (as he was bound to do) a lead from *Kurian Augusty's case*[3].

Justice M.M. Ismail, in *Solomon* v. *Muthiah*[4], held after elaborate discussion that their Lordships were wrong in *Kurian Augusty's case*[3], and that the Indian Succession Act, 1925, had, since 1st April, 1951, applied to all Christians in Kerala. If this is correct, and if one day a sufficiently wealthy Christian estate goes to the Supreme Court and the latter endorses the learned Tamilnad Justice's view of the law, all decisions in this field in the Travancore-Cochin area of Kerala since the appointed day in 1951 will have been wrong. Thiru Venkatachari, defends the Kerala, not the Tamilnad decision. In a few words I want to show why he is right, and why, alas, the learned Tamilnad justice is wrong. The whole thing is deplorable, since, on the merits of the matter Justice Ismail was obviously right. It is high time the merits were attended to. Yet Parliament is too busy to reform the Indian Succession Act, which is hopelessly out of date, and until it finds time and skilled advice appropriate to the task it is up to the Courts to use their special attribute (as in a recent Hindu law case regarding reversioners and section 8 of the Hindu Succession Act, 1956) of abandoning the technically unexceptional solution in favour of one which the public at large would welcome.

Section 29 of the Indian Succession Act, 1925, reads:

(1) This Part shall not apply....to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

(2) Save as provided in sub-section (1) or by any other law for the time being in

1. 1956 K.L.T. 559 : A.I.R. 1957 T.C. 1.
2. 1973 K.L.T. 728.
3. 1956 K.L.T. 559 : A.I.R. 1957 T.C. 1.
4. (1974) 1 M.L.J. 53.

force, the provisions of this Part shall constitute the law of India in all cases of intestacy.

The Indian Legislature did not have in contemplation legislation in the so-called Native States. However, the words must be taken as they stood in 1951 when the Act, along with many others, was extended to Part B States. Section 6 of Central Act III of 1951 provides that if immediately before the appointed day there is in force in any Part B State any law *corresponding* to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in *this Act* (italics supplied), stand repealed. At the time when the Indian Succession Act was extended to Travancore-Cochin there were three non-Hindu - Muhammadan - Buddhist - Sikh-Jaina Communities to which that Act could have applied *viz.*, Christians, Parsis and Jews. There was no legislation covering all of these in either Travancore or Cochin, and no legislation which did precisely the task which the Indian Succession Act did. Thus until Travancore-Cochin passed a statute which *corresponded* the very possibility of conflict or repugnancy did not arise. The Kerala justices were, in my submission, quite right in supposing that the Travancore Christian Succession Act (and the Cochin Christian Succession Act, 1097, for that matter) rested secure until comprehensive legislation should be undertaken.

It is altogether unnecessary and inappropriate to rest the decision either on the alleged fact that the Travancore statute codified customary law (did it?), for once statute has intervened custom has no relevance, in social or purely legal terms, until the question of reform arises. It is also inappropriate to concentrate on section 29 (2) of the Indian Succession Act: Act III of 1951 did not extend the Act, therefore one does not consult it; but, if for argument's sake one were to consult it, the 'law' referred to must be a law excluding the operation of that very Act of 1925 (as Justice Ismail says), and this is not to be found (naturally) in our context. If it is argued that I have taken too close a look at the word "corresponding", I draw attention to the intriguing case of *Shivadeviamma* v. *Sumanji*[5], approving of *Sundara* v. *Girija*[6]. In effect, the want of congruence between competing statutes saved the Madras Act of 1949 from repeal by the Central Act of 1956. Although the circumstances are different the *merits* of the Act of 1949 may well be less !

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5. A.I.R. 1973 Mys. 299 (F.B.)
6. A.I.R. 1962 Mys. 72 (F.B.)

INDEBTED PERSONS AND LEGISLATIVE MEASURES FOR THEIR RELIEF.

By

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It may be recalled that the early years of the thirties of this century witnessed acute economical depression. There was a sharp fall in the prices of all goods, especially of agricultural products. Persons whose source of livelihood was agriculture were worse hit than others and they were unable to repay the debts which they had borrowed at high rates of interest. Therefore urgent relief was needed in their distressed condition. The Madras Provincial Legislature headed by Mr. C. Rajagopalachari framed a bill in 1937 and passed Act No. IV of 1938 providing for the relief of indebted agriculturists. It classified debts under two broad heads: (*a*) those incurred before 1st October, 1932; and (*b*) those incurred after 1st October, 1932. As regards the second category, the debtors were enabled to pay interest on the principal amount at rates decidedly lower than those agreed upon. The creditors would recover their principal sums plus nominal interest. Though the Act is generally expropriatory in charactor, this class of cases worked no serious hardship on creditors while conferring some benefit on debtors.

The first category of debts incurred before 1st October, 1932 calls for some examination, especially in view of the two recent enactments Act XXXVIII of 1972 and Act VIII of 1973, which is an amendment of the 1938 Act. Section 8 is the pivotal provision for relief of indebted agriculturists. 1st October, 1937 has been fixed in the Act for regulating the rights and obligations of the parties. Sub-section (1) enacted that arrears of interest outstanding on the said date will be deemed to be discharged leaving the principal sum alone as repayable. Sub-sections (2) and (3) deal with cases where the debtors were going on making payments either towards principal or towards interest or both. In this connection it may be relevant to refer to the rule of *damdupat* which is found in the Hindu Law branch relating to debts. The principle underlying it is to prevent accumulation of interest by debtors. It ordained that if the interest allowed to accumulate exceeded the principal the debtor was conferred the benefit of having his liability discharged if he pays *at a time* the entire interest and such portion of the principal which would together make up twice the principal sum. This rigid rule of *damdupat* was relaxed in sub-sections (2) and (3) and the debtor was enabled to total up all payments whether paid towards interest or principal on different dates and pay only the difference or shortage to reach the limit of twice the principal sum. An additional benefit was given to him that if he had paid any sum specifically towards principal he need pay only the balance to get the entire loan fully discharged.

It will be clear from the above analysis that except in cases not likely to frequently occur in actual practice, where the paid up interest exceeds the principal, the integrity of the principal sum is kept intact, the creditor losing only interest in whole or in part.

In 1972 and early 1973, three Acts came into force. Under Act XXI of 1972, cultivating tenants of lands were sought to be benefited and relieved against arrears of lease rents, which they had defaulted to pay. If they paid the rents for Fasli 1381 alone before a specified date, all prior arrears stood wiped out. Act XXXVIII of 1972 was passed for the

relief of indebted persons excluding agriculturists in respect of whom Act VIII of 1973 was passed by way of amending the parent Act IV of 1938.

By about 1972, prices of goods had risen and there was easy availability of money due to inflation of currency. Therefore it was generally felt that there was no need for such far-reaching measures. There was no movement much less agitation clamouring for any relief. Only a passing reference is made to this aspect, as the motive has no bearing when the present discussion proceeds on a forensic field.

Section 8 of Act IV of 1938 has been repeated in Act XXXVIII of 1972 and retained in the amending Act VIII of 1973. But sub-section (1) in the older Act which wiped out the outstanding arrears has been omitted. Sub-sections (2) and (3) have been kept untouched. The Explanation to the section which was introduced in 1948 has been totally altered by providing that all payments though they were paid expressedly on interest account shall be compulsorily credited towards principal. This amended Explanation is drastic in its effect. This question under the Agricultural Relief Act came up for decision recently before Ismail and Natarajan, JJ. It has been reported in *Navis Ammal Fernando* v. *S. Subbiah Iyer*[1], the learned Judges held that the Explanation has got an overriding effect and it must be given its full force and operation. It is further held that sub-sections (2) and (3) have no real value and significance and are mere surplusage. There is a further observation that the omission of sub-section (1) makes no legal difference. This decision is of far-reaching importance and is entitled to utmost respect. It has however led to serious reflections amongst the creditors *vis-a-vis* their debtors. Credit and private banking facilities have been crippled and the creditors have got a reasonable apprehension that any future loans to debtors may be affected by future legislation to a similar effect. When the Legislature has retained the sub-sections some weight has got to be attached to them and it will not be quite correct to say that they have got to be ignored. The Explanation is meant as the word signifies to explain and not to destroy the main provisions which it seeks to explain. A harmonious interpretation and co-ordinated construction has got to be evolved out of seemingly conflicting provisions. A humble attempt is made in this direction by the following suggestion:—

Interest is to be calculated at the statutory rate on the principal amount till the date of first payment by the debtor, the sum so paid is to be deducted from the principal and on the balance so found, interest is to be calculated till the date of the second payment. This process is to be continued as far as necessary.

By this method of computation the creditors get some interest and principal also, while the debtor is deriving the statutory benefit by having their payment adjusted towards the principal.

If the Legislature in its wisdom had intended the Explanation to render nugatory the sub-sections and to give full effect only to the amended Explanation it was quite easy for it to have dropped the sub-sections and frame section 8 in a simple and easy manner thus "All debts incurred before 1st March, 1972 shall be scaled in the following manner:—

All payments by debtors whether made towards principal or interest shall be credited towards the principal and balance *amount* left after such deduction shall alone be repayable."

1. (1974) 1 M.L.J. 334.

This has not been done and it is therefore permissible to find a *via media* which will give effect to the entire section. The aforesaid calculation furnishes a satisfactory solution to the problem.

The parent Act IV of 1938 did not go unchallenged. It was attacked on two grounds that it offended the Negotiable Instruments Act and that it was *ultra vires* the Constitution. Both these grounds were rejected by the Courts. It may be that the Acts taken as a whole did not offend the right guaranteed by the Constitution. But it is entirely different now to suggest that some provisions of the new Act are repugnant to Article 19 (1) (*f*) of the Constitution. The creditors' right to safeguard the principal amount under all circumstances except by mutual agreement is a fundamental right to hold property guaranteed by the Constitution. If this aspect of the matter is correct, the amended Explanation is liable to be struck down as violative of the creditors' right to hold property.

In view of the foregoing submissions it is fervently hoped that the Legislature will step in to remove the apparent conflict or the High Court may finally clarify the position in any appropriate proceedings.